Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1998

FERMIN C. PEREZ,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

On Petition for Writ of Certiorari
to the Arizona Supreme Court

PETITION FOR WRIT OF CERTIORARI

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16 pp

QUESTIONS PRESENTED FOR REVIEW

Whether Mr. Perez's Lack of Notice of the Pretrial Evidentiary Hearing in this Case Denied Him the Right to Confront Witnesses Against Him, Denied Him His Due Process Right to Be Present at All Stages of the Proceedings and Denied Him the Right to Effective Assistance of Trial Counsel?

Whether Arizona May Limit a DUI Suspect's Right to Consult an Attorney to Include Only Telephone Consultation Rather than Face to Face Communication?

TABLE OF CONTENTS

Questions Presented for Review ii

Table of Contents iii

Table of Cited Authorities iv

Statement of the Basis for Jurisdiction in this Court 1

Constitutional Provisions Involved in this Case 1

Statement of the Case Setting Out Facts Material to a Consideration of the Question Presented 1

Argument

Mr. Perez's Lack of Notice of the Pretrial Evidentiary Hearing in This Case Denied Mr. Perez the Right to Confront Witnesses Against Him, Denied Mr. Perez His Due Process Right to be Present at All Stages of the Proceedings and Denied the Right to Effective Assistance of Counsel 4

Arizona May Not Limit a DUI Suspect's Right to Consult an Attorney to Include Only Telephone Consultation Rather than Face to Face Communication 7

TABLE OF CITED AUTHORITIES

CASES:

Brosan v. Cochran,
307 Md. 662, 669, 516 A.2d 970 (1986) 9

Ching v. Lewis,
895 F.2d 608 (4th Cir. 1989) 8

Hopt v. Utah,
110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884) 7

Illinois v. Allen,
397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970) 7

Kentucky v. Stincer,
484 U.S. 730, 107 S.Ct. 26, 96 L.Ed. 631 (1987) 7

Kunzler v. Superior Court,
154 Ariz. 568, 744 P.2d 669 (1987) 4

Lewis v. United States,
146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 262 (1884) 7

McNutt v. Superior Court,
133 Ariz. 7, 648 P.2d 122 (1982) 9

People v. Gursey,
2d 224, 239 N.E.2d 351,
292 N.Y.S.2d 416, (1968) 8, 9

Seattle v. Box,
29 Wash. App. 109, 627 P.2d 584 (1981) 8

State v. Juarez,
161 Ariz. 76, 775 P.2d 1140 (1989) 4

State v. Kneisl,
312 Minn. 281, 251 N.W.2d 645 (1977) 8

United States v. Janis,
820 F. Supp. 512, 517 (S.D. CA 1992) 8

CONSTITUTIONAL PROVISIONS:

U.S. Const., Amdt. 5 ..... 1, 7

U.S. Const., Amdt. 6 1

U.S. Const., Amdt. 14 1

STATUTES:

UNITED STATES CODE

28 U.S.C. 1257 1

UNPUBLISHED OPINIONS AND ORDERS ENTERED IN THIS CASE:

State of Arizona v. Fermin C. Perez, slip op. No. 2 CA-CR 97-0185 (March 31, 1998), *review denied* CR-98-0244-PR (October 14, 1998)

STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

The Supreme Court of Arizona entered an order denying Mr. Perez's Petition for Review from a Direct Appeal on the 14th day of October, 1998. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257. As he did below, Mr. Perez here asserts the deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

U.S. Const. , Amdt. 5

. . . nor be deprived of life, liberty, or property without due process of law . . .

U.S. Const. , Amdt. 6

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defence.

U.S. Const. , Amdt. 14

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE SETTING OUT FACTS MATERIAL TO A CONSIDERATION OF THE QUESTION PRESENTED

On August 29, 1996, an evidentiary hearing on a pretrial motion to dismiss felony DUI charges was held in Mr. Perez's absence. Mr. Perez was absent only because his trial attorney failed to notify him of the hearing. Mr. Perez's case was prejudiced by his absence because the arresting officer testified at the hearing to facts which were not reflected in his report, which were contradicted by

the officer's pretrial interview, and which would have been contradicted by Mr. Perez's testimony, had Mr. Perez been present. He was also prejudiced by his absence because his trial attorney was not aware that he spent over an hour in a holding cell before being booked and that he was not, therefore, able to use the phone in booking immediately after his arrest as the officer had testified.

On September 21, 1993, at approximately 1:05 a.m. or shortly thereafter, Deputy Todd Greene stopped Mr. Perez for speeding near Craycroft Road and Sunrise Drive in Tucson, Arizona. (RT August 29, 1996, p. 5-11.) Following field sobriety tests, Mr. Perez was placed under arrest at 1:25 a.m. (RT August 29, 1996, p. 11.) After being advised of his Miranda rights, Mr. Perez stated, according to Deputy Greene's testimony, "I want an attorney right now, Harold Hyams." He then stated, according to Deputy Greene, "I want an attorney before I do any tests right now." (RT August 29, 1996, p. 12.)

Rather than making arrangements for Mr. Perez to contact an attorney, Deputy Greene continued his investigation, inquiring as to whether Mr. Perez would submit to a chemical test. Mr. Perez agreed to take a blood test and, according to Deputy Greene's testimony, stated "I want an attorney present while I do the test" while in route to El Dorado Hospital at approximately 1:30 a.m. Deputy Greene testified that he advised Mr. Perez "that he was not permitted to have an attorney present during the testing and he could make a call to an attorney." Deputy Greene also testified that Mr. Perez "insisted that he have an attorney present at the test." (RT August 29, 1996, p. 14.) Because Mr. Perez insisted on having an attorney present at the test, and because Deputy Greene felt that Mr. Perez did not have the right to have an attorney present, Deputy Greene treated Mr. Perez's insistence as a refusal to complete a chemical test. (RT August 29, 1996, p. 14.)

Deputy Greene arrived at the Pima County Jail with Mr. Perez at approximately 1:45 a.m. Mr. Perez was read the Implied Consent Affidavit at the Pima County Jail. Following that reading he stated "I want an attorney present right now." Deputy Greene also noted on the affidavit that Mr. Perez "would not do test without one." (RT August 29, 1996, p. 16.) Deputy Greene testified that he made no

arrangements at the Pima County Jail for Mr. Perez to contact an attorney. (RT August 29, 1996, p. 16.) According to the Pima County Jail booking form, Mr. Perez was ultimately booked by jail personnel at 2:47 a.m. (ROA 292.) When asked by counsel for the state whether he had ever offered Mr. Perez an opportunity to make a phone call to an attorney, Deputy Greene stated "not while I was at Pre-Trial Services. I honestly don't recall." (RT August 29, 1996, p. 19.) On redirect by counsel for Mr. Perez, Deputy Greene admitted that time had not yet become a problem with respect to a chemical test. At that point Deputy Greene claimed that he had offered to allow Mr. Perez to call an attorney but that Mr. Perez wanted to have an attorney present. (RT August 29, 1996, p. 21.)

Mr. Perez, having not received notice of the evidentiary hearing, was not present at the hearing when Deputy Greene made that claim. Had Mr. Perez been present, he would have testified that, at no time, did Deputy Greene ever offer to allow him to use the telephone. (ROA at 291; RT March 3, 1997, p. 6-7.) Upon further cross-examination by counsel for Mr. Perez, Deputy Greene was forced to admit that he had not mentioned offering Mr. Perez the opportunity to use the telephone in his police report or in an interview conducted on August 21, 1996. (RT August 29, 1996, p. 22.) During the interview, when asked what opportunity he had provided Mr. Perez to contact an attorney, Deputy Greene replied "well, at that point, I took him to jail because he said earlier while we were in the vehicle, he said, I want an attorney before I take any tests of my blood." (RT August 29, 1996, p. 29.)

Mr. Perez was not at the hearing held August 29, 1996, solely because he had not received notice of the hearing. (RT March 3, 1997, p. 3.) Mr. Perez's calendar for 1996 showed no notation of a hearing on August 29. Mr. Perez and his wife, Betty Perez, both testified that they reviewed their file of documents in this case and found no notice of the August 29 hearing from trial counsel. (RT March 3, 1997, p. 3-5, 12.)

Mr. Perez raised the federal question of his lack of notice of the pretrial evidentiary hearing, citing federal authorities, in his February 17, 1997, request for hearing to determine voluntariness of absence from evidentiary hearing (Appendix to Petition for Certiorari,

p. xlvii), which was denied by minute entry dated March 10, 1997. (Appendix to Petition for Certiorari, p. xxxi.) It was raised on direct appeal in his opening brief filed September 15, 1997 (Appendix to Petition for Certiorari, p. xv), and denied on the merits by memorandum decision dated March 31, 1998. (Appendix to Petition for Certiorari, p. xiii.) It was presented to the Arizona Supreme Court by Petition for review filed March 12, 1998. (Appendix to Petition for Certiorari, p. iv.) Review was denied by order of the Arizona Supreme Court dated October 14, 1998. (Appendix to Petition for Certiorari, p. iii.)

Mr. Perez raised the federal question of the denial of his right to consult in person with an attorney by motion to suppress/dismiss filed August 16, 1996 (Appendix to Petition for Certiorari, p. cxxvi), by motion to reconsider/dismiss filed December 4, 1996 (Appendix to Petition for Certiorari, p.lxviii), and by motion to vacate judgement filed February 19, 1997. (Appendix to Petition for Certiorari, p. xlvii.) It was denied by the trial court at the evidentiary hearing held August 29, 1996 (Appendix to Petition for Certiorari, p. lxxxvi), at the hearing on the motion to reconsider held December 4, 1996 (Appendix to Petition for Certiorari, p. lxviii), and by minute entry on March 10, 1997. (Appendix to Petition for Certiorari, p. xxxi) It was raised o direct appeal in the opening brief filed September 15, 1997 (Appendix to Petition for Certiorari, p. xv), and denied on the merits by memorandum decision dated March 31, 1998. (Appendix to Petition for Certiorari, p. xiii.) It was presented to the Arizona Supreme Court by petition for review filed May 12, 1998. (Appendix to Petition for Certiorari, p. iv.) Review was denied October 14, 1998.(Appendix to Petition for Certiorari, p. iii.)

ARGUMENT

MR. PEREZ'S LACK OF NOTICE OF THE PRETRIAL EVIDENTIARY HEARING IN THIS CASE DENIED MR. PEREZ THE RIGHT TO CONFRONT WITNESSES AGAINST HIM, DENIED MR. PEREZ HIS DUE PROCESS RIGHT TO BE PRESENT AT ALL STAGES OF THE PROCEEDINGS AND DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Mr. Perez was not present at the evidentiary hearing held in this matter on August 29, 1996, solely because he did not receive notice of the hearing date.[1] Because of his involuntary absence from the hearing, Mr. Perez was unable to confront the witness, Deputy Green, he was unable to rebut the testimony of Office Green and he was unable to assist his trial counsel in further cross-examining Deputy Green.

Deputy Green offered two critical pieces of testimony which Mr. Perez was unable to confront or to rebut. The first was Deputy Green's testimony that Mr. Perez had the opportunity to request one phone call from jail personnel when he was booked into the Pima County Jail. (RT August 29, 1996, p. 16.) Had Mr. Perez been present at the evidentiary hearing, he would have pointed out to trial counsel that Deputy Green left him at the Pima County Jail in a holding cell and it was well over an hour before jail personnel removed him from the holding cell for booking, a fact easily verified by reference to Mr. Perez's booking sheet which shows him being booked into the Pima County Jail at 2:47 a.m.

---

1 While a letter may have been sent to Mr. Perez, neither he nor his wife ever received it, it is not in the file he and his wife have kept, and it is not reflected in his 1996 calendar. Furthermore, the letter does not indicate that there will be witness testimony nor does it indicate that Mr. Perez should be present. (Defense Exhibit "B" 3/3/97.)

Furthermore, both Kunzler, 154 Ariz. 568, 744 P.2d 669 (1987) and State v. Juarez, 161 Ariz. 76, 775 P.2d 1140 (1989), allow the accused to consult an attorney before deciding to take a chemical test. By the time Mr. Perez was booked, Deputy Green had advised him of his license suspension for refusal to take a chemical test, completed his paperwork and left the jail. Judge Donfeld obviously was not informed that the license suspension had already been served and the investigation completed by the time that Mr. Perez was booked as Judge Donfeld commented during argument that Mr. Perez could have elected the breath test while at Pre-Trial Services. (RT August 29, 1996, at p. 29-30.) Had Mr. Perez been advised of the hearing date, he could have pointed this fact out to counsel.

Most damaging to Mr. Perez was Deputy Green's surprise testimony, in Mr. Perez's absence, that he had offered Mr. Perez the opportunity to call an attorney. (RT August 29, 1996, at p. 21.) Although Deputy Green quoted Mr. Perez's exact words in requesting an attorney at several points in his police report (RT August 29, 1996, p. 13, 16.), Deputy Green never mentioned in his police report offering a phone call to Mr. Perez or Mr. Perez refusing a phone call. (RT August 29, 1996, at p. 22.) When interviewed by trial counsel, Deputy Green made no mention of offering Mr. Perez a phone call. (RT August 29, 1996, at p. 22.) In fact, when asked during the interview "and what opportunity did you provide him to contact this attorney?" Deputy Green replied "Well, at that point, I took him to jail because he said earlier while we were in the vehicle, he said, I want an attorney before I take any tests of my blood." (RT August 29, 1996, at p. 29.)

During examination by trial counsel, Deputy Green stated that, after the first request for an attorney, what he did next was to ask Mr. Perez if he would submit to a chemical test. (RT August 29, 1996, at p. 12.) After the next request for an attorney Deputy Green stated that what he did was to tell Mr. Perez that he was not permitted to have an attorney present during the testing. (RT August 29, 1996, at p. 14.) When questioned by trial counsel as to what opportunities he gave Mr. Perez to contact an attorney, Office Green testified he had no opportunity at the scene to let Mr. Perez contact an attorney. (RT August 29,1 996, at p. 14.) He also testified that, while he was

driving past public telephones, he did not stop to let Mr. Perez use the telephone. (RT August 29, 1996, at p. 14-15.) When the court inquired as to whether Mr. Perez was given the opportunity to call an attorney at the jail, Deputy Green still had no recollection of offering to allow Mr. Perez to call an attorney and stated that the jail personnel would allow one phone call. (RT August 29, 1996, at p. 16.) During examination by the prosecutor, Deputy Green was asked:

> Q: At any time post-arrest, did you offer the defendant an opportunity to make a phone call to an attorney?
>
> A: Not while I was at Pre-Trial Services. I honestly don't recall.

(RT August 29, 1996, at p. 19.) After trial counsel for Mr. Perez established that Deputy Green was under no time pressure to complete the chemical tests within 2 hours and phone calls would have taken 5 to 10 minutes that Deputy Green suddenly recalled offering Mr. Perez the opportunity to call an attorney. (RT August 29, 1996, at p. 21.) (Even so, Deputy Green's testimony was that Mr. Perez wanted an attorney present and Deputy Green did not think that Mr. Perez had the right to have an attorney present. Even by Deputy Green's newly recovered memory, Mr. Perez's right to counsel was denied.) Deputy Green subsequently lost his newly recovered memory after the evidentiary hearing, testifying at the first trial that he gave Mr. Perez an opportunity to use the phone only by taking him to jail:

> Q. What opportunity did you give him at any time to contact an attorney?
>
> A. I informed him that phones were available at pretrial services for him to make a phone call if pretrial would allow that.

(R.T. September 6, 1996, p. 72)

Given the previous inconsistencies in Deputy Green's testimony, reports and interview, given the sudden motive to fabricate upon being pinned down as to the lack of any time pressure, and given Deputy Green's failure to recollect the crucial issue during his interview or in his police report, Deputy Green's deception of Judge Donfeld is readily apparent. Had Mr. Perez been present at the evidentiary hearing, Mr. Perez would have testified that, at no point, did Deputy Green ever offer him the opportunity to make a phone call. (R.T. March 3, 1997, p. 6-7.)

The right of a defendant charged with a felony to be personally present in the courtroom at every stage of his trial conducted is fundamental to our system of justice. "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner." Lewis v. United States, 146 U.S. 370, 372, 13 S.Ct. 136, 137, 36 L.Ed. 1011 (1892). This principle has been constantly upheld and continually reaffirmed. Hopt v. Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884); Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); Kentucky v. Stincer, 482 U.S. 730, 745, 107 S.Ct. 26, 58, 96 L.Ed.2d 631 (1987). The right to be present at every stage of trial is protected by the due process and confrontation clauses of the Fifth and Sixth Amendments to the United States Constitution.

ARIZONA MAY NOT LIMIT A DUI SUSPECT'S RIGHT TO CONSULT AN ATTORNEY TO INCLUDE ONLY TELEPHONE CONSULTATION RATHER THAN FACE TO FACE COMMUNICATION

Other states which have considered this issue have held that a DUI suspect has the right to consult an attorney in person following arrest:

> "Law enforcement officials may not, without justification, prevent access between the criminal accused and his lawyer, available in person or by immediate telephone

> communication, if such access does not interfere unduly with the matter at hand." (Emphasis added.)

People v. Gursey, 22 N.Y.2d 224, 227, 239 N.E.2d 351, 352, 292 N.Y.S.2d 416, 418 (1968).

Maryland has interpreted that identical language to permit face to face consultation:

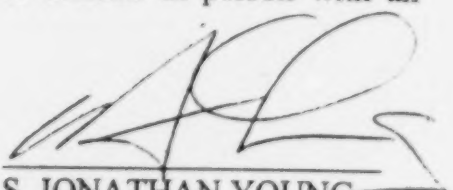
> "Nor is the constitutional right to counsel in any event limited solely to lawyer-telephonic communication, as the superintendent further contends. In no way do we limit mode of lawyer-client communication in Sites or otherwise differentiate between telephone and face to face consultation. Indeed, we quoted with approval from a New York Court of Appeals case [the same quoted in McNutt] which involved, as here, the right of a drunk driver suspect to counsel prior to deciding whether to submit to the sobriety test 'law enforcement officials may not, without justification, prevent access between the criminal accused and his lawyer, available in person or by immediate telephone communication, if such access does not interfere unduly with the matter at hand...' Sites, supra, at 1713, 41 A.2d 192 (quoting People v. Gursey, 22 N.Y.2d 224, 292 N.Y.Sd 416, 418, 239 N.E.2d 351, 352 (1968))."

Brosan v. Cochran, 307 Md. 662, 669, 516 A.2d 970 (1986).

See also, State v. Kneisl, 312 Minn. 281, 251 N.W.2d 645 (1977) ("[I]t would be a sham to permit the telephone to call and then deny the [DUI] arrested person an opportunity to consult with his attorney at the jail."); Seattle v. Box, 29 Wash. App. 109, 627 P.2d 584 (1981) (Once a defendant arrested and charged with driving under the influence of intoxicating liquor has made telephone contact with an attorney the police may not, without reasonable justification, prevent the attorney from making personal contact with the defendant.); Ching v. Lewis, 895 F.2d 608, (9th Cir.1989) (attorney-

prisoner communication by telephone, by mail, or even a hole through in the glass is not effective.); United States v. Janis, 820 F. Supp. 512, 517 (S.D. CA 1992) ("the court orders that the metropolitan correctional center allow Janis to conduct private, in-person consultations with his attorneys and in all pending litigation and with the court appointed investigator working on the criminal case pending in this district.").

Arizona has, in McNutt v. Superior Court, 133 Ariz. 7, 9, 648 P.2d 122, 124 (1982), adopted the holding in People v. Gursey, supra, regarding the right of a DUI suspect to consult an attorney. Arizona has, however, declined in this case to permit that consultation to be in person. There is a resulting split between Arizona and New York, Maryland, Minnesota and Washington, with all of the other states extending a DUI suspect the right to consult in person with an attorney.



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APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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132 pp

TABLE OF CONTENTS

October 14, 1998, Order of the Supreme Court of Arizona Denying Petition for Review iii

May 12, 1998, Petition for Review by Arizona Supreme Court iv

March 31, 1998, Memorandum Decision of the Arizona Court of Appeals xiii

Appellant's Opening Brief Filed September 15, 1997, in Arizona Court of Appeals xv

April 11, 1997, Judgement and Conviction xxvi

March 10, 1997, Order Denying Motion to Vacate Judgement and Denying Request for Rehearing xxxi

Reporter's Transcript of March 3, 1997, Hearing on Motion to Vacate Judgement/Motion for New Hearing xxxii

Motion for Release Pending Appeal/Motion to Vacate Judgement/Request for Hearing to Determine Voluntariness of Absence from Evidentiary Hearing Filed February 19, 1997 xlvii

Reporter's Transcript of December 16, 1996, Motion to Reconsider lvii

December 4, 1996, Motion to Reconsider/ Motion to Dismiss lxviii

August 29, 1996, Hearing on Pretrial Evidentiary Motions lxxxvi

August 16, 1996, Motion to Suppress/Dismiss cxxvi

OCTOBER 14, 1998, ORDER OF THE SUPREME COURT OF ARIZONA DENYING PETITION FOR REVIEW

STATE OF ARIZONA
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October 14, 1998

RE: STATE OF ARIZONA V8. FERMIN C. PEREZ aka FERNANDO PEREZ
Supreme Court No. CR-98-0244-PR
Court of Appeals No. 2 CA-CR 97-0185
Pima County No. CR-52507

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on October 8, 1998, in regard to the above-referenced cause:

ORDERED: Petition for Review by the Supreme Court = DENIED.

A panel composed of Vice Chief Justice Jones, Justice Martone, and Justice McGregor participated in the determination of this matter.

Record returned to Court of Appeals, Division Two, Tucson, this 14th day of October, 1998.

NOEL K. DESSAINT, Clerk

TO:
Hon. Grant Woods, Arizona Attorney General
Attn: Paul J. McMurdie, Esq. and Donna J. Lam, Esq.

S. Jonathan Young, Esq.
Fermin C. Perez
Joyce Goldsmith, Clerk, Court of Appeals, Division Two, Tucson
Lexis-Nexis
West Publishing Company

MAY 12, 1998, PETITION FOR REVIEW BY ARIZONA SUPREME COURT

The petitioner, Fermin C. Perez, by and through his attorney, S. Jonathan Young, hereby petitions the Arizona Supreme Court for a review of the Court of Appeals's memorandum decision dated March 31, 1998, and order denying reconsideration dated April 30, 1998, affirming Mr. Perez's conviction and the sentence imposed.

I

Synopsis of the Decision of the Court of Appeals

On March 31, 1998, Division 2 of the Court of Appeals filed its memorandum decision in the above entitled matter affirming Mr. Perez's conviction in this matter. The Court of Appeals held, in effect, that the police may limit a DUI suspect's right to counsel to telephonic contact only, regardless of interference with the ongoing investigation. The Court of Appeals also held that the defendant voluntarily waived his presence at the pretrial evidentiary hearing held with no actual notice to him. A copy of those decisions are attached.

II

Issues Presented for Review

WHETHER MR. PEREZ'S CONVICTION SHOULD BE REVERSED ON APPEAL BASED ON THE ARRESTING OFFICER'S ADMITTED DENIAL OF MR. PEREZ'S RIGHT TO CONSULT WITH COUNSEL IN PERSON FOLLOWING HIS ARREST?

WHETHER MR. PEREZ'S LACK OF NOTICE OF THE

EVIDENTIARY HEARING IN THIS CASE DENIED MR. PEREZ THE RIGHT TO CONFRONT WITNESSES AGAINST HIM, DENIED MR. PEREZ HIS DUE PROCESS RIGHT TO BE PRESENT AT ALL STAGES OF THE PROCEEDINGS AND DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL?

III

Statement of Material Facts

On September 21, 1993, at approximately 1:05 a.m. or shortly thereafter, Deputy Todd Greene stopped Mr. Perez for speeding near Craycroft Road and Sunrise Drive. (RT August 29, 1996, p. 5-11.) Following field sobriety tests, Mr. Perez was placed under arrest at 1:25 a.m. (RT August 29, 1996, p. 11.) After being advised of his Miranda rights, Mr. Perez stated, according to Deputy Greene's testimony, "I want an attorney right now, Harold Hyams." He then stated, according to Deputy Greene, "I want an attorney before I do any tests right now." (RT August 29, 1996, p. 12.)

Rather than making arrangements for Mr. Perez to contact an attorney, Deputy Greene continued his investigation, inquiring as to whether Mr. Perez would submit to a chemical test. Mr. Perez agreed to take a blood test and, according to Deputy Greene's testimony, stated "I want an attorney present while I do the test" while in route to El Dorado Hospital at approximately 1:30 a.m. Deputy Greene testified that he advised Mr. Perez (erroneously) "that he was not permitted to have an attorney present during the testing and he could make a call to an attorney." Deputy Greene also testified that Mr. Perez "insisted that he have an attorney present at the test." (RT August 29, 1996, p. 14.) Because Mr. Perez insisted on having an attorney present at the test, and because Deputy Greene felt that Mr. Perez did not have the right to have an attorney present, Deputy Greene treated Mr. Perez's insistence as a refusal to complete a chemical test. (RT August 29, 1996, p. 14.) Deputy Greene arrived at the Pima County Jail with Mr. Perez at approximately 1:45 a.m. Mr. Perez was read the Implied Consent Affidavit at the Pima County Jail. Following that reading he stated

"I want an attorney present right now." Deputy Greene also noted on the affidavit that Mr. Perez "would not do test without one." (RT August 29, 1996, p. 16.) Deputy Greene testified that he made no arrangements at the Pima County Jail for Mr. Perez to contact an attorney. (RT August 29, 1996, p. 16.) According to the Pima County Jail booking form, Mr. Perez was ultimately booked by jail personnel at 2:47 a.m. (ROA 292.) When asked by counsel for the state whether he had ever offered Mr. Perez an opportunity to make a phone call to an attorney, Deputy Greene stated "not while I was at Pre-Trial Services. I honestly don't recall." (RT August 29, 1996, p. 19.) On redirect by counsel for Mr. Perez, Deputy Greene admitted that time had not yet become a problem with respect to a chemical test. At that point Deputy Greene claimed that he had offered to allow Mr. Perez to call an attorney but that Mr. Perez wanted to have an attorney present. (RT August 29, 1996, p. 21.)

Mr. Perez, having not received notice of the evidentiary hearing, was not present at the hearing when Deputy Greene made that claim. Had Mr. Perez been present, he would have testified that, at no time, did Deputy Greene ever offer to allow him to use the telephone. (ROA at 291; RT March 3, 1997, p. 6-7.) Upon further cross-examination by counsel for Mr. Perez, Deputy Greene was forced to admit that he had not mentioned offering Mr. Perez the opportunity to use the telephone in his police report or in an interview conducted on August 21, 1996. (RT August 29, 1996, p. 22.) During the interview, when asked what opportunity he had provided Mr. Perez to contact an attorney, Deputy Greene replied "well, at that point, I took him to jail because he said earlier while we were in the vehicle, he said, I want an attorney before I take any tests of my blood." (RT August 29, 1996, p. 29.)

Mr. Perez was not at the hearing held August 29, 1996, solely because he had not received notice of the hearing. (RT March 3, 1997, p. 3.) Mr. Perez's calendar for 1996 showed no notation of a hearing on August 29. Mr. Perez and his wife, Betty Perez, both testified that they reviewed their file of documents in this case and found no notice of the August 29 hearing from trial counsel. (RT March 3, 1997, p. 3-5, 12.)

ARGUMENT I

MR. PEREZ'S CONVICTION SHOULD BE REVERSED ON APPEAL BASED ON THE ARRESTING OFFICER'S ADMITTED DENIAL OF MR. PEREZ'S RIGHT TO CONSULT WITH COUNSEL BY TELEPHONE OR IN PERSON FOLLOWING MR. PEREZ'S ARREST

A line of cases beginning with McNutt v. Superior Court, 133 Ariz. 7, 648 P.2d 122 (1982), requires Mr. Perez's conviction to be set aside based solely on Deputy Green's testimony at the August 29, 1996, evidentiary hearing held in this matter. Contrary to the understanding of everyone who appeared at the August 29, 1996, evidentiary hearing in this matter, McNutt v. Superior Court allows an accused to contact his lawyer either by telephone or in person:

> "We agree with the Court of Appeals of New York, which said, 'Law enforcement officials may not, without justification, prevent access between the criminal accused and his lawyer, available in person or by immediate telephone communication, if such access does not interfere unduly with the matter at hand.' People v. Gursey, 22 N.Y.2d 224, 227, 239 N.E.2d 351, 352, 292 N.Y.S.2d 416, 418 (1968)." (Emphasis added.)

McNutt v. Superior Court, 133 Ariz. 7, 9, 648 P.2d 122, 124 (1982).

Maryland has interpreted that identical language to permit face to face consultation:

> "Nor is the constitutional right to counsel in any event limited solely to lawyer-telephonic communication, as the superintendent further contends. In no way do we limit mode of lawyer-client communication in Sites or otherwise differentiate between telephone and face to face consultation. Indeed, we quoted with approval from a New York Court of Appeals case [the same quoted in McNutt] which involved, as here, the right of a drunk driver suspect to counsel prior to deciding

> whether to submit to the sobriety test 'law enforcement officials may not, without justification, prevent access between the criminal accused and his lawyer, available in person or by immediate telephone communication, if such access does not interfere unduly with the matter at hand...' Sites, supra, at 1713, 41 A.2d 192 (quoting People v. Gursey, 22 N.Y.2d 224, 292 N.Y.Sd 416, 418, 239 N.E.2d 351, 352 (1968))."

Brosan v. Cochran, 307 Md. 662, 669, 516 A.2d 970 (1986). See also, State v. Kneisl, 312 Minn. 281, 251 N.W.2d 645 (1977) ("[I]t would be a sham to permit the telephone to call and then deny the [DUI] arrested person an opportunity to consult with his attorney at the jail."); Seattle v. Box, 29 Wash. App. 109, 627 P.2d 584 (1981) (Once a defendant arrested and charged with driving under the influence of intoxicating liquor has made telephone contact with an attorney the police may not, without reasonable justification, prevent the attorney from making personal contact with the defendant.); Ching v. Lewis, 895 F.2d 608, (9th Cir.1989) (attorney-prisoner communication by telephone, by mail, or even a hole through in the glass is not effective.); United States v. Janis, 820 F. Supp. 512, 517 (S.D. CA 1992) ("the court orders that the metropolitan correctional center allow Janis to conduct private, in-person consultations with his attorneys and in all pending litigation and with the court appointed investigator working on the criminal case pending in this district.").

Because Officer Green did not properly understand Mr. Perez's right to consult in person with an attorney, Mr. Perez was denied any attempt to secure that right. The remedy for such a denial, if the accused has requested an attorney and if the accused is not released immediately after the investigation, is the dismissal of the charges. McNutt, supra; State v. Holland, 147 Ariz. 453, 455, 711 P.2d 592, 594 (1985); State v. Dennett, slip op. No. 1 CA-CR 91-1807 (November 9, 1993). Because Mr. Perez's defense counsel had apparently not read McNutt nor any of several of the Arizona Supreme Court cases subsequent to McNutt closely enough in preparation for the hearing, she was unable to offer Judge Donfeld

BEST AVAILABLE COPY

any guidance or to cite Judge Donfeld to the appropriate portion of McNutt, and provided Mr. Perez with ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 1052, 80 L.Ed.2d 674 (1984).

ARGUMENT II

MR. PEREZ'S LACK OF NOTICE OF THE EVIDENTIARY HEARING IN THIS CASE DENIED MR. PEREZ THE RIGHT TO CONFRONT WITNESSES AGAINST HIM, DENIED MR. PEREZ HIS DUE PROCESS RIGHT TO BE PRESENT AT ALL STAGES OF THE PROCEEDINGS AND DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Mr. Perez was not present at the evidentiary hearing held in this matter on August 29, 1996, solely because he did not receive notice of the hearing date.[2] Because of his involuntary absence from the hearing, Mr. Perez was unable to confront the witness, Deputy Green, he was unable to rebut the testimony of Office Green and he was unable to assist his trial counsel in further cross-examining Deputy Green.

Deputy Green offered two critical pieces of testimony which Mr. Perez was unable to confront or to rebut. The first was Deputy Green's testimony that Mr. Perez had the opportunity to request one phone call from jail personnel when he was booked into the Pima County Jail. (RT August 29, 1996, p. 16.) Had Mr. Perez been present at the evidentiary hearing, he would have pointed out to trial counsel that Deputy Green left him at the Pima County Jail in a holding cell and it was well over an hour before jail personnel removed him from the holding cell for booking, a fact easily verified

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While a letter may have been sent to Mr. Perez, neither he nor his wife ever received it, it is not in the file he and his wife have kept, and it is not reflected in his 1996 calendar. Furthermore, the letter does not indicate that there will be witness testimony nor does it indicate that Mr. Perez should be present. (Defense Exhibit "B" 3/3/97.)

by reference to Mr. Perez's booking sheet which shows him being booked into the Pima County Jail at 2:47 a.m.

Furthermore, both Kunzler and State v. Juarez, 161 Ariz. 76, 775 P.2d 1140 (1989), allow the accused to consult an attorney before deciding to take a chemical test. By the time Mr. Perez was booked, Deputy Green had advised him of his license suspension for refusal to take a chemical test, completed his paperwork and left the jail. Judge Donfeld obviously was not informed that the license suspension had already been served and the investigation completed by the time that Mr. Perez was booked as Judge Donfeld commented during argument that Mr. Perez could have elected the breath test while at Pre-Trial Services. (RT August 29, 1996, at p. 29-30.) Had Mr. Perez been advised of the hearing date, he could have pointed this fact out to counsel.

Most damaging to Mr. Perez was Deputy Green's surprise testimony, in Mr. Perez's absence, that he had offered Mr. Perez the opportunity to call an attorney. (RT August 29, 1996, at p. 21.) Although Deputy Green quoted Mr. Perez's exact words in requesting an attorney at several points in his police report (RT August 29, 1996, p. 13, 16.), Deputy Green never mentioned in his police report offering a phone call to Mr. Perez or Mr. Perez refusing a phone call. (RT August 29, 1996, at p. 22.) When interviewed by trial counsel, Deputy Green made no mention of offering Mr. Perez a phone call. (RT August 29, 1996, at p. 22.) In fact, when asked during the interview "and what opportunity did you provide him to contact this attorney?" Deputy Green replied "Well, at that point, I took him to jail because he said earlier while we were in the vehicle, he said, I want an attorney before I take any tests of my blood." (RT August 29, 1996, at p. 29.)

During examination by trial counsel, Deputy Green stated that, after the first request for an attorney, what he did next was to ask Mr. Perez if he would submit to a chemical test. (RT August 29, 1996, at p. 12.) After the next request for an attorney Deputy Green stated that what he did was to tell Mr. Perez that he was not permitted to have an attorney present during the testing. (RT August 29, 1996, at p. 14.) When questioned by trial counsel as to what opportunities he gave Mr. Perez to contact an attorney, Office Green testified he

had no opportunity at the scene to let Mr. Perez contact an attorney. (RT August 29,1 996, at p. 14.) He also testified that, while he was driving past public telephones, he did not stop to let Mr. Perez use the telephone. (RT August 29, 1996, at p. 14-15.) When the court inquired as to whether Mr. Perez was given the opportunity to call an attorney at the jail, Deputy Green still had no recollection of offering to allow Mr. Perez to call an attorney and stated that the jail personnel would allow one phone call. (RT August 29, 1996, at p. 16.) During examination by the prosecutor, Deputy Green was asked:

> Q: At any time post-arrest, did you offer the defendant an opportunity to make a phone call to an attorney?
>
> A: Not while I was at Pre-Trial Services. I honestly don't recall.

(RT August 29, 1996, at p. 19.) After trial counsel for Mr. Perez established that Deputy Green was under no time pressure to complete the chemical tests within 2 hours and phone calls would have taken 5 to 10 minutes that Deputy Green suddenly recalled offering Mr. Perez the opportunity to call an attorney. (RT August 29, 1996, at p. 21.) (Even so, Deputy Green's testimony was that Mr. Perez wanted an attorney present and Deputy Green did not think that Mr. Perez had the right to have an attorney present. Even by Deputy Green's newly recovered memory, Mr. Perez's right to counsel was denied.) Deputy Green subsequently lost his newly recovered memory after the evidentiary hearing, testifying at the first trial that he gave Mr. Perez an opportunity to use the phone only by taking him to jail:

> Q. What opportunity did you give him at any time to contact an attorney?
>
> A. I informed him that phones were available at pretrial services for him to make a phone call if pretrial would

allow that.

(R.T. September 6, 1996, p. 72)

Given the previous inconsistencies in Deputy Green's testimony, reports and interview, given the sudden motive to fabricate upon being pinned down as to the lack of any time pressure, and given Deputy Green's failure to recollect the crucial issue during his interview or in his police report, Deputy Green's deception of Judge Donfeld is readily apparent. Had Mr. Perez been present at the evidentiary hearing, Mr. Perez would have testified that, at no point, did Deputy Green ever offer him the opportunity to make a phone call. (R.T. March 3, 1997, p. 6-7.)

The right of a defendant charged with a felony to be personally present in the courtroom at every stage of his trial conducted is fundamental to our system of justice. "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner." Lewis v. United States, 146 U.S. 370, 372, 13 S.Ct. 136, 137, 36 L.Ed. 1011 (1892). This principle has been constantly upheld and continually reaffirmed. Hopt v. Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884); Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); Kentucky v. Stincer, 482 U.S. 730, 745, 107 S.Ct. 26, 58, 96 L.Ed.2d 631 (1987).

The right to be present at trial is protected by the due process and confrontation clauses of the Sixth Amendment to the United States Constitution and by article II, §§ 4 and 24 of the Arizona Constitution. State v. Levato, 924 P.2d 445, ____ Ariz. ____ (1996). See also, State v. Bishop, 139 Ariz. 567, 679 P.2d 1054 (1984).

IV

Reasons the Petition Should be Granted

This Petition should be granted because this court has not directly addressed the right of a suspect to face to face consultation with an attorney, because important issues of law have been incorrectly, because Deputy Greene has denied Mr. Perez his right to counsel under McNutt by refusing his request to have an attorney present before testing, and because Mr. Perez never received personal

notice of the August 29, 1997, evidentiary hearing.

Respectfully submitted this 12th day of April, 1998.

MARCH 31, 1998, MEMORANDUM DECISON OF THE ARIZONA COURT OF APPEALS

STATE OF ARIZONA MAR 3 1 1998
DIVISION TWO
COURT OF APPEALS
DIVISION TWO
THE STATE OF ARIZONA,
Appellee, DEPARTMENT B
v.
FERMIN C. PEREZ, aka FERNANDO PEREZ,
2 CA-CR 97-0185
MEMORANDUM DECISION
Not for Publication
Rule 111, Rules of
the Supreme Court
Appellant.

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-52507

Honorable John E. Davis, Judge

AFFIRMED

Grant Woods, The Attorney General
By Paul J. McMurdie and Donna J. Lam Tucson
Attorneys for Appellee
S. Jonathan Young Tucson
Attorney for Appellant

ESPINOSA,Judge.

Appellant Fermin Perez was placed on probation for ten years after a jury convicted him of aggravated driving while under the influence of alcohol. The court suspended the six month jail term and the mandatory four-month prison term pending the outcome of appeal. On appeal Perez claims his right to counsel was violated, he was denied his due process right toattend the hearing on the pretrial motions, and trial counsel was ineffective. We affirm.

Perez first argues that he was denied his right to consult with an attorney in person before he decided whether to submit to blood testing. The transcript of the hearing on the pretrial motions reveals that the arresting sheriff's deputy offered Perez the opportunity to make a telephone call to counsel, but he insisted that he wanted an attorney physically present. The officer told Perez more than once that he could make a telephone call to speak to counsel, but that he did not have a right to have counsel present at the time of the testing. The responsibility of resolving credibility issues lies with the trial court. State v. Tapia, 159 Ariz. 284, 767 P.2d 5 (i988); State v. Vanoy, 177 Ariz. 206, 866 P.2d 874 (App. 1993). It was therefore for the trial court to determine, based on its assessment of the officer's credibility, whether Perez was offered the ability to make a telephone call to counsel. The trial court concluded that Perez had not been deprived of his right to counsel, apparently believing he had been given the opportunity to consult with counsel by telephone.

Perez also claims he was entitled to consult with an attorney ain person" before deciding whether to submit to chemical testing. He has not, however, cited any authority, nor have we found any, which requires that counsel be physically present. Indeed, he cites McNutt v. Superior Court, 133 Ariz. 7, 648 P.2d 122 (1982), which clearly states that a defendant is entitled to confer with counsel either in person or by telephone. It is the consultation wiffi counsel that is important, not counsel's physical presence at the scene. See State v. Juarez, 161 Ariz. 76, 775 P.2d 1140 (1989); State v. HolEmd, 147 Ariz. 453, 711 P.2d 592 (1985); McNutt. The trial court did not err in finding that Perez was not denied his right to counsel.

Perez also claims his due process rights were violated when

the pretrial evidentiary hearing was held in his absence because he was unable to confront the sheriffws deputy and assist defense counsel in cross-examination. The deputy's testimony was the basis for the trial court's determination that Perez's right to counsel had not been abridged. However, a defendant may waive his right to be present at any proceeding by voluntarily absenting himself from it. State v. AmayaRuiz, 166 Ariz. 152, 800 P.2d 1260 (1990). Defense counsel waived Perez's presence at the hearing and such waiver is binding on him. See State v. Spreitz, 190 Ariz. 129, 945 P.2d 1260 (1997). Moreover, at a hearing on the voluntariness of his absence from the evidentiary hearing, Perez merely claimed he did not receive counsel's letter informing him of the hearing, although he concedes in his opening brief that the letter may have been sent. On this record we cannot say the trial court abused its discretion in proceeding in Perez's absence or refusing to holdanother hearing.

Because Perez's claim of ineffective assistance of counsel relates to matters outside the record on appeal, we cannot address it. His claim must be presented to the trial court pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S., to allow the trial court to determine if an evidentiary hearing is warranted. State v. Valdez, 160 Ariz. 9, 770 P.2d 313 (1989); State v. Carver, 160 Ariz. 167, 771 P.2d 1382 (1989).

The judgment of conviction and the sentence imposed are affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

JOHN PELANDER, Presiding Judge

JOSEPH W. HOWARD, Judge

APPELLANT'S OPENING BRIEF FILED SEPTEMBER 15, 1997, IN ARIZONA COURT OF APPEALS

STATEMENT OF FACTS

On September 21, 1993, at approximately 1:05 a.m. or shortly thereafter, Deputy Todd Greene stopped Mr. Perez for speeding near Craycroft Road and Sunrise Drive. (RT August 29, 1996, p. 5-11.) Following field sobriety tests, Mr. Perez was placed under arrest at 1:25 a.m. (RT August 29, 1996, p. 11.) After being advised of his Miranda rights, Mr. Perez stated, according to Deputy Greene's testimony, "I want an attorney right now, Harold Hyams." He then stated, according to Deputy Greene, "I want an attorney before I do any tests right now." (RT August 29, 1996, p. 12.)

Rather than making arrangements for Mr. Perez to contact an attorney, Deputy Greene continued his investigation, inquiring as to whether Mr. Perez would submit to a chemical test. Mr. Perez agreed to take a blood test and, according to Deputy Greene's testimony, stated "I want an attorney present while I do the test" while in route to El Dorado Hospital at approximately 1:30 a.m. Deputy Greene testified that he advised Mr. Perez (erroneously) "that he was not permitted to have an attorney present during the testing and he could make a call to an attorney." Deputy Greene also testified that Mr. Perez "insisted that he have an attorney present at the test." (RT August 29, 1996, p. 14.) Because Mr. Perez insisted on having an attorney present at the test, and because Deputy Greene felt that Mr. Perez did not have the right to have an attorney present, Deputy Greene treated Mr. Perez's insistence as a refusal to complete a chemical test. (RT August 29, 1996, p. 14.) Although there were public pay phones available, Deputy Greene testified that he did not stop to provide Mr. Perez the opportunity to make a phone call. (RT August 29, 1996, p. 14-15.) Deputy Greene arrived at the Pima County Jail with Mr. Perez at approximately 1:45 a.m. Mr. Perez was read the Implied Consent Affidavit at the Pima County Jail. Following that reading he stated "I want an attorney present right now." Deputy Greene also noted on the affidavit that Mr. Perez "would not do test without one." (RT August 29, 1996, p. 16.) Deputy Greene testified that he made no arrangements at the Pima County Jail for Mr. Perez to contact an attorney. (RT August 29, 1996, p. 16.) According to the Pima

County Jail booking form. Mr. Perez was ultimately booked by jail personnel at 2:47 a.m. (ROA 292.) When asked by counsel for the state whether he had ever offered Mr. Perez an opportunity to make a phone call to an attorney, Deputy Greene stated "not while I was at Pre-Trial Services. I honestly don't recall." (RT August 29, 1996, p. 19.) On redirect by counsel for Mr. Perez, Deputy Greene admitted that time had not yet become a problem with respect to a chemical test. At that point Deputy Greene claimed that he had offered to allow Mr. Perez to call an attorney but that Mr. Perez wanted to have an attorney present. (RT August 29, 1996, p. 21.)

Mr. Perez, having not received notice of the evidentiary hearing, was not present when Deputy Greene made that claim. Had Mr. Perez been present, he would have testified that, at no time, did Deputy Greene ever offer to allow him to use the telephone. (ROA at 291; RT March 3, 1997, p. 6-7.) Upon further cross-examination by counsel for Mr. Perez, Deputy Greene was forced to admit that he had not mentioned offering Mr. Perez the opportunity to use the telephone in his police report or in an interview conducted on August 21, 1996. (RT August 29, 1996, p. 22.) During the interview, when asked what opportunity he had provided Mr. Perez to contact an attorney, Deputy Greene replied "well, at that point, I took him to jail because he said earlier while we were in the vehicle, he said, I want an attorney before I take any tests of my blood." (RT August 29, 1996, p. 29.)

Mr. Perez was not at the hearing held August 29, 1996, solely because he had not received notice of the hearing. (RT March 3, 1997, p. 3.) Mr. Perez's calendar for 1996 showed no notation of a hearing on August 29. Mr. Perez and his wife, Betty Perez, both testified that they reviewed their file of documents in this case and found no notice of the August 29 hearing from trial counsel. (RT March 3, 1997, p. 3-5, 12.) On March 26, 1996, a direct indictment was filed in the Pima County Superior Court charging Mr. Perez with one count of aggravated DUI in violation of A.R.S. § 28-697. (ROA 1.) On August 16, 1996, trial counsel filed a Motion to Dismiss based on Mr. Perez's repeated request to have an attorney present. (ROA 83.) That motion was denied by Judge

Donfeld on August 29, 1996. On September 6, 1996, the first trial held in this matter resulted in a mistrial following a hung jury. (ROA 181-183.) Trial counsel for Mr. Perez filed a Motion to Reconsider on December 5, 1996, citing to McNutt v. Superior Court, 133 Ariz. 7, 648 P.2d 122 (1982) and State v. Holland, 147 Ariz. 453, 711 P.2d 592 (App. 1985). (ROA 195-208.) The Motion to Reconsider was denied on December 16, 1996, by Judge Donfeld (ROA 212.) and, on December 23, 1996, following the second jury trial held in this matter, Mr. Perez was convicted of a single count of DUI. On February 4, 1997, present counsel for Mr. Perez substituted into the case. A motion for Mr. Perez's release pending appeal, a motion to vacate judgement, and a request for hearing to determine the voluntariness of Mr. Perez's absence from the August 29, 1996, evidentiary hearing were filed on February 19, 1997. (ROA 275-326.) On March 10, 1997, Judge Davis granted Mr. Perez's release on an appeal bond and denied the other motions. (ROA 274-336.) Mr. Perez was sentenced in this matter on April 11, 1997 (ROA 345-351.), and a Notice of Appeal was filed the same date in court. (ROA 352-353.)

ARGUMENT I

MR. PEREZ'S CONVICTION SHOULD BE REVERSED ON APPEAL BASED ON THE ARRESTING OFFICER'S ADMITTED DENIAL OF MR. PEREZ'S RIGHT TO CONSULT WITH COUNSEL BY TELEPHONE OR IN PERSON FOLLOWING MR. PEREZ'S ARREST

A line of cases beginning with McNutt v. Superior Court, 133 Ariz. 7, 648 P.2d 122 (1982), requires Mr. Perez's conviction to be set aside based solely on Deputy Green's testimony at the August 29, 1996, evidentiary hearing held in this matter.

Contrary to the understanding of everyone who appeared at the August 29, 1996, evidentiary hearing in this matter, McNutt v. Superior Court allows an accused to contact his lawyer either by telephone or in person:

> "We agree with the Court of Appeals of New York, which said, 'Law enforcement officials may not,

> without justification, prevent access between the criminal accused and his lawyer, available in person or by immediate telephone communication, if such access does not interfere unduly with the matter at hand.' People v. Gursey, 22 N.Y.2d 224, 227, 239 N.E.2d 351, 352, 292 N.Y.S.2d 416, 418 (1968)." (Emphasis added.)

McNutt v. Superior Court, 133 Ariz. 7, 9, 648 P.2d 122, 124 (1982). The court went on to state, footnote number 2, "If the lawyer cannot be reached by telephone or cannot promptly appear where the defendant is, the state may continue with its detention procedures." (Emphasis added.) The defendant is entitled to consult with the attorney "before taking a chemical breath test." Kunzler v. Superior Court, 154 Ariz. 568, 744 P.2d 669 (1987).

Deputy Green repeatedly testified that, following his arrest, Mr. Perez repeatedly stated that he "wanted an attorney right now" or that he "wanted an attorney present." (RT August 29, 1996, p. 12, 13, 14, 15, 16, 18, 19, 21, 22 and 23.) Deputy Green testified to his apparent misunderstanding of a suspect's right to counsel, stating "I had been trained that it was not his right to have an attorney present at the point of the chemical test." (RT August 29, 1996, p. 23.) Deputy Green also testified repeatedly that he told Mr. Perez that Mr. Perez did not have the right to have an attorney present. (RT August 29, 1996, p. 14, 18-19, 22 and 23-24.) Even the prosecutor stated during oral argument, "He's not entitled to have an attorney present . . . ." (RT August 29, 1996, p. 27.)

Because Officer Green did not properly understand Mr. Perez's right to consult in person with an attorney, Mr. Perez was denied any attempt to secure that right. Because Mr. Perez's defense counsel had apparently not read McNutt nor any of several of the Arizona Supreme Court cases subsequent to McNutt closely enough in preparation for the hearing, she was unable to offer Judge Donfeld any guidance or to cite Judge Donfeld to the appropriate portion of McNutt.

The language in McNutt permitting a defendant to consult with his lawyer in person was repeated in State v. Holland, 147 Ariz.

453, 455, 711 P.2d 592, 594 (1985), in Kunzler v. Superior Court, 154 Ariz 568, 570, 744 P.2d 669, 671 (1987) and in State v. Juarez, 161 Ariz., 76, 80, 775 P.2d 1140, 1144 (1989). See also Ching v. Lewis, 895 F.2d 608 (9th Cir. 1989), reversing grant of summary judgement in § 1983 case and holding that the arbitrary policy of denying contact visits with attorney, requiring instead that the prisoner communicate with attorney through hole in glass, or by mail or by telephone, prohibits effective attorney-client communication.

The remedy for such a denial, if the accused has requested an attorney and if the accused is not released immediately after the investigation, is the dismissal of the charges. McNutt, supra; State v. Holland, 147 Ariz. 453, 455, 711 P.2d 592, 594 (1985); State v. Dennett, slip op. No. 1 CA-CR 91-1807 (November 9, 1993). In Holland, as in McNutt, the Supreme Court required that the charges be dismissed as the remedy stating that it is impossible to foresee what advice would have been given the defendant had he been able to confer privately with counsel.

The state seems to indicate, in its written response to Mr. Perez's McNutt Motion filed prior to the evidentiary hearing, that the fact that any consultation with an attorney would have delayed somewhat the DUI investigation excuses Deputy Green's refusal to allow Mr. Perez to have an attorney present. The accused is entitled to such access, however, as long as it does not interfere unduly with the matter at hand. State v. Holland, 147 Ariz. at 464; McNutt v. Superior Court, 133 Ariz. at 9; Kunzler v. Superior Court, 154 Ariz. at 570; State v. Juarez, 161 Ariz. at 80. Mr. Perez was stopped at 1:05 a.m. and placed under arrest at 1:25 a.m. At that point he began requesting an attorney. (RT August 29, 1996, p. 11-12.) Deputy Green testified that time was not a problem with respect to the 2 hour window for obtaining a blood test. (RT August 29, 1996, p. 20.) As the time factor was not a factor, and as Deputy Green interpreted Mr. Perez's demand to have an attorney present as a refusal to take the breath test, the request for an attorney could not have presented the prospect of undue delay. If fact, based on Deputy Green's treatment of the request for counsel as a refusal, all that remained at that point was to transport Mr. Perez to the Pima County Jail. The state appears, however, to have abandoned the idea of undue delay at the

evidentiary hearing.

Had trial counsel read any of the relevant cases, McNutt, Holland, Kunzler or Juarez, prior to the evidentiary hearing, she could have pointed out to Judge Donfeld that Deputy Green and the prosecutor were both incorrect in their assertions that Mr. Perez was not entitled to consult an attorney in person before taking a chemical test. Based solely on the testimony of Deputy Green, the charges should have been dismissed. The touchstone of an ineffective assistance of counsel claim is whether the defendant was denied a fair trial. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 1052, 80 L.Ed.2d 674 (1984); State v. Valdez, 167 Ariz. 328, 806 P.2d 1376 (1991). The defendant must show first that trial counsel's performance fell below an objective standard of reasonably effective assistance under prevailing professional norms, and second, that trial counsel's performance has prejudiced defendant's case. State v. Valdez, supra. Trial counsel's basic unfamiliarity with the cases upon which she was relying falls below an objective standard. The fact that the language of the cases is outcome determinative establishes the prejudice.

ARGUMENT II

MR. PEREZ'S LACK OF NOTICE OF THE EVIDENTIARY HEARING IN THIS CASE DENIED MR. PEREZ THE RIGHT TO CONFRONT WITNESSES AGAINST HIM, DENIED MR. PEREZ HIS DUE PROCESS RIGHT TO BE PRESENT AT ALL STAGES OF THE PROCEEDINGS AND DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Mr. Perez was not present at the evidentiary hearing held in this matter on August 29, 1996, solely because he did not receive notice of the hearing date.[3] Because of his involuntary absence from

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[3] While a letter may have been sent to Mr. Perez, neither he nor his wife ever received it, it is not in the file he and his wife have kept, and it is not reflected in his 1996 calendar. Furthermore, the letter does not indicate that there will be witness testimony nor does it

the hearing, Mr. Perez was unable to confront the witness. Deputy Green, he was unable to rebut the testimony of Office Green and he was unable to assist his trial counsel in further cross-examining Deputy Green.

Deputy Green offered two critical pieces of testimony which Mr. Perez was unable to confront or to rebut. The first was Deputy Green's testimony that Mr. Perez had the opportunity to request one phone call from jail personnel when he was booked into the Pima County Jail. (RT August 29, 1996, p. 16.) Had Mr. Perez been present at the evidentiary hearing, he would have pointed out to trial counsel that Deputy Green left him at the Pima County Jail in a holding cell and it was well over an hour before jail personnel removed him from the holding cell for booking, a fact easily verified by reference to Mr. Perez's booking sheet which shows him being booked into the Pima County Jail at 2:47 a.m.

Trial counsel further exhibited her lack of familiarity with the McNutt line of cases by failing to point out to the court that both Kunzler and State v. Juarez, 161 Ariz. 76, 775 P.2d 1140 (1989), allow the accused to consult an attorney before deciding to take a chemical test. By the time Mr. Perez was booked, Deputy Green had advised him of his license suspension for refusal to take a chemical test, completed his paperwork and left the jail. Judge Donfeld obviously was not informed that the license suspension had already been served and the investigation completed by the time that Mr. Perez was booked as Judge Donfeld commented during argument that Mr. Perez could have elected the breath test while at Pre-Trial Services. (RT August 29, 1996, at p. 29-30.)

Most damaging to Mr. Perez was Deputy Green's surprise testimony, in Mr. Perez's absence, that he had offered Mr. Perez the opportunity to call an attorney. (RT August 29, 1996, at p. 21.) Although Deputy Green quoted Mr. Perez's exact words in requesting an attorney at several points in his police report (RT August 29, 1996, p. 13, 16.), Deputy Green never mentioned in his police report

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indicate that Mr. Perez should be present. (Defense Exhibit "B" 3/3/97.)

offering a phone call to Mr. Perez or Mr. Perez refusing a phone call. (RT August 29, 1996, at p. 22.) When interviewed by trial counsel, Deputy Green made no mention of offering Mr. Perez a phone call. (RT August 29, 1996, at p. 22.) In fact, when asked during the interview "and what opportunity did you provide him to contact this attorney?" Deputy Green replied "Well, at that point, I took him to jail because he said earlier while we were in the vehicle, he said, I want an attorney before I take any tests of my blood." (RT August 29, 1996, at p. 29.)

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> Q: At any time post-arrest, did you offer the defendant an opportunity to make a phone call to an attorney?
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> A: Not while I was at Pre-Trial Services. I honestly don't recall.

(RT August 29, 1996, at p. 19.) After trial counsel for Mr. Perez established that Deputy Green was under no time pressure to complete the chemical tests within 2 hours and phone calls would

have taken 5 to 10 minutes that Deputy Green suddenly recalled offering Mr. Perez the opportunity to call an attorney. (RT August 29, 1996, at p. 21.) (Even so, Deputy Green's testimony was that Mr. Perez wanted an attorney present and Deputy Green did not think that Mr. Perez had the right to have an attorney present. Even by Deputy Green's newly recovered memory, Mr. Perez's right to counsel was denied.) Deputy Green subsequently lost his newly recovered memory after the evidentiary hearing, testifying at the first trial that he gave Mr. Perez an opportunity to use the phone only by taking him to jail:

> Q. What opportunity did you give him at any time to contact an attorney?
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> A. I informed him that phones were available at pretrial services for him to make a phone call if pretrial would allow that.

(R.T. September 6, 1996, p. 72)

Given the previous inconsistencies in Deputy Green's testimony, reports and interview, given the sudden motive to fabricate upon being pinned down as to the lack of any time pressure, and given Deputy Green's failure to recollect the crucial issue during his interview or in his police report, Deputy Green's deception of Judge Donfeld is readily apparent. Had Mr. Perez been present at the evidentiary hearing, Mr. Perez would have testified that, at no point, did Deputy Green ever offer him the opportunity to make a phone call. (R.T. March 3, 1997, p. 6-7.)

The right of a defendant charged with a felony to be personally present in the courtroom at every stage of his trial conducted is fundamental to our system of justice. "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner." Lewis v. United States, 146 U.S. 370, 372, 13 S.Ct. 136, 137, 36 L.Ed. 1011 (1892). This principle has been constantly upheld and continually reaffirmed. Hopt v. Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884); Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057,

25 L.Ed.2d 353 (1970). One of the most basic of the rights guaranteed by the confrontation clause is the accused right to be present at every stage of his trial. Lewis v. United States, supra. The Supreme Court has also stated that a defendant "has a due process right to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." Kentucky v. Stincer, 482 U.S. 730, 745, 107 S.Ct. 26, 58, 96 L.Ed.2d 631 (1987). The court in Stincer also stated that a defendant is constitutionally "guaranteed the right to present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." Stincer, 482 U.S. at 745.

The right to be present at trial is protected by the due process and confrontation clauses of the Sixth Amendment to the United States Constitution and by article II, §§ 4 and 24 of the Arizona Constitution. State v. Levato, 924 P.2d 445, ____ Ariz. ____ (1996). 17 A.R.S. Rules of Crim.Proc., Rule 9.1, permits the inference that a defendant is voluntarily absent from a proceeding, thus waiving his rights to confrontation and due process, if the defendant had personal notice of the time of the proceeding, the right to be present at it, and a warning that the proceeding would go forward in his or her absence.

In State v. Bishop, 139 Ariz. 567, 679 P.2d 1054 (1984), the court remanded for a new competency hearing where the record was insufficient to conclude that the defendant was aware of the nature of the third and fourth days of his Rule 11 hearing when he refused transportation from the jail to court. The new hearing was to be held either in the defendant's presence or with his presence to have been found properly and voluntarily waived. Mr. Perez similarly requests that the evidentiary hearing in this matter be held in his presence as he maintained constant contact with both his attorney and Pre-Trial Services and yet never received notice that the hearing was being held and cannot, therefore, be said to have waived his right to confront Deputy Green and to be present to testify and to assist his attorney at the hearing.

CONCLUSION

As Deputy Greene has denied Mr. Perez his right to counsel under McNutt by refusing his request to have an attorney present

before testing, Mr. Perez requests that his conviction in this matter be set aside.

As Mr. Perez never received personal notice of the August 29, 1997, evidentiary hearing, and as his presence was necessary to a fair determination of the facts at that hearing, Mr. Perez alternatively requests that this matter be remanded for a hearing to be held in his presence.

APRIL 11, 1997, JUDGEMENT AND CONVICTION

SUPERIOR COURT OF ARIZONA

[James N. Corbett]
PIMA COUNTY

TUCSON, AZ

8 April 11. 1997 Hon. JohnE. Davis Rosemarie Chastain
Div Date Judge Deputy

NO. CR-52507

STATE OF ARIZONA Michael Gatto on behalf of Vehicular Offense Team
for the State
VS

FERMIN C. PEREZ, aka
Fermin C. Perez, S. Jonathan Young for the Defendant
Fernando Perez

DATE(S) OF BIRTH: 717163; 7/7/62

SENTENCE OF PROBATION

The State is represented by the above named Deputy County Attorney; the Defendant is present with counsel named above.

COURT REPORTER: Terri Faust

The Defendant is advised of the charge and the determination of guilt, and all parties are given the opportunity to speak.

Pursuant to A.R.S. Section 13-607, the Court finds as follows:

JURY VERDICT The determination of guilt was based upon a verdict of guilty after a jury trial.

Page 1
8 April 11. 1997 Hon. JohnE. Davis Rosemarie Chastain
Div Date Judge Deputy

NO. CR-52507

STATE VS. FERMIN C. PEREZ, aka
Fermin C. Perez,
Fernando Perez

Having found no legal cause to delay rendition of judgment and pronouncement of sentence, the Court enters the following judgment and sentence.

IT IS THE JUDGMENT OF THE COURT that the Defendant is guilty of the crime of COUNT ONE, AGGRAVATED DRIVING UNDER THE INFLUENCE OF INTOXICATING LIQUOR, WHILE LICENSE OR PRIVILEGE TO DRIVE IS SUSPENDED, CANCELED, REVOKED OR REFUSED OR IN VIOLATION OF A RESTRICTION, a Class four felony, nondangerous and nonrepetitive offense, in violation of A.R.S. 28697(A)(1), (D), (E), (H), (I) and (J); 28-692(A)(1) committed on September 21, 1993.

Upon consideration of the offense, and the facts, law and circumstances involved in this case,

THE COURT FINDS that the Defendant is eligible for probation. The specific reasons for the granting of probation are stated by the Court on the record.

The Court further finds that the term of probation should include

incarceration in the County Jail as a term and condition of probation.

As punishment for this/these crime(s),

IT IS ORDERED suspending imposition of sentence and placing the Defendant on probation for a period of 10 year(s) commencing this date, April 11, 1997 under the supervision of the Adult Probation Department of this Court, in accordance with the formal Judgment and Order suspending sentence and imposing terms of probation signed by the Court.

As conditions of probation, the defendant shall:

1. Pay monthly probation fees to the Clerk of the Superior Court of $50.

2. Be incarcerated in the Pima County Jail for a period of 6 month(s), which jail sentence is suspended pending resolution of the defendant's appeal. During the service of that sentence, the defendant will be eligible for work furlough.

Page 2
8 Aprilll.1997 Hon.JohnE. Davis RosemarieChastain
Div Date Judge Deputy

NO. CR-52507

STATE VS. FERMIN C. PEREZ, aka
Fermin C. Perez,
Fernando Perez

3. Pay $100 to the Victim Compensation Fund.

4. Pay attorney's fees of $1,000, payable to the Clerk of the Superior Court.

5. Pay a fine of $2,000, payable to the Clerk of the Superior Court.

6. If assessments are not paid this same date, the defendant is further assessed $12 pursuant to A.R.S. Section 12-1 16.

7. Contribute 85 hours of community service, at the rate of not less than ten (10) hours per month.

8. Abide by all requirements contained in the Conditions of Probation and be subject to all requirements in Attachment A to the Conditions of Probation, in the discretion of the probation of ficer.

9. Consume no alcoholic beverages.

10. Participate in treatment and/or training programs as directed by the probation officer.

11. In accordance with A.R.S. 12-299, participate in the Community Punishment Program, including participating in substance abuse counseling, performing 85 hours community service, abiding by curfew/approved schedule, submitting to drug/alcohol tests, consuming no alcohol and participating in a life/social skills program. THE COURT FINDS that, but for the Community Punishment Program, the defendant would be sentenced to jail or prison.

12. Not operate a motor vehicle without a valid driver's license and not obtain a driver' s license unless and until the probation officer approves.

13. Take Antabuse if medically prescribed and at the direction of the probation of ficer.

14. Attend the MADD-Victim Impact Penal.

On agreement,

xxx

NO. CR-52507

STATE VS. FERMIN C. PEREZ, aka
Fermin C. Perez,
Fernando Perez

IT IS FURTHER ORDERED that all conditions of probation are considered conditions of the defendant's release while on released on appeal bond and any violation of those can result in a motion to revoke release even though an appeal bond has been posted and could result in the defendant going to jail or to the Department of Corrections.

IT IS THE FURTHER JUDGMENT AND SENTENCE OF THE COURT that the defendant is sentenced to the mandatory prison term of FOUR (4) MONTHS, which prison sentence is suspended because of the granting of the appeal bond in this case. Should the conviction be affirmed or the defendant not remain on appeal bond, he must serve the mandatory four months in the Department of Corrections.

IT IS FURTHER ORDERED that the driver's license issued to the defendant is forfeited to the court at this time pursuant to statute. The Clerk is directed to forward the defendant's driver's license to the Motor Vehicle Department.

The written terms and conditions of probation are handed to the Defendant for explanation, acceptance, and signature. Defendant agrees to the stated waiver of right of extradition. The Defendant is advised concerning the consequences of failure to abide by the conditions of probation.

The Defendant is advised concerning rights of review and written notice of those rights is provided.

ISSUED: Order of Release

IT IS ORDERED that the Clerk of the Superior Court remit to the

Department of Corrections a copy of this Order. plus all presentence reports, probation violation reports, medical and psychological reports relating to the Defendant and involving this cause.

FILED: Conditions of Probation and Notice of Right to Review, both signed by the Defendant and copies provided to the Defendant; Presentence Report--Part One.

Page 4
8 April 11. 1997 Hon. JohnE. Davis RosemarieChastain
Div Date Judge Deputy

NO. CR-52507

STATE VS. FERMIN C. PEREZ, aka
Fermin C. Perez,
Fernando Perez

Let the record reflect that the Defendant's fingerprint is permanently affixed to the signature page of this sentencing order in open Court.

FILED IN COURT: Notice of Appeal Conditions of Release Setting Bond on Appeal in the amount of $1,100 Surety Bond on Appeal in the Amount of $1,100

MARCH 10, 1997, ORDER DENYING MOTION TO VACATE JUDGEMENT AND DENYING REQUEST FOR REHEARING

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. JOHN E. DAVIS CASE NO. CR - 52507
COURT REPORTER: none DATE: March 10, 1997

STATE OF ARIZONA

V.S..

FERMIN C. PEREZ, aka Fernando nmn Perez

,
MINUTE ENTRY
UNDER ADVISEMENT RULING

IT IS ORDERED the Defendant's request for Judgment to be vacated is DENIED.

IT IS FURTHER ORDERED the Defendant's request for re-hearing of Judge Donfeld's rulings on the Defendant's pretrial motions is DENIED.

IT IS FURTHER ORDERED the Defendant's request for Appeal Bond pursuant to Rule 7.2(6)(1) is GRANTED.

REPORTER'S TRANSCRIPT OF MARCH 3, 1997, HEARING ON MOTION TO VACATE JUDGEMENT/MOTION FOR NEW HEARING

FERMIN PEREZ,

having been sworn to tell the truth, the whole truth, and

nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. YOUNG:

Q. Sir, will you please tell us your name?

A. Fermin Perez.

Q. How old are you?

A. 33 years old.

Q. And where do you work?

A. Citizens Utility Company.

Q. Are you the defendant in this case?

A. Yes, I am.

Q. And your sentencing is pending now, you understand, on the 17th of this month?

A. Yes.

Q. Can you tell us who your attorney was for your trial?

A. Tamara Walters.

Q. And how many times was that trial held?

A. The trial was held twice.

Q. Okay. Before those trials took place, there was a hearing held on August 29th of last year. Were you present at that hearing?

A. No, I wasn't.

Q. Was there a reason why you weren't present at that hearing?

A. I didn't know I was supposed to be there.

Q. Have you looked at your calendar for last year?

A. Yes.

Q. And where were you on August 29th of last year?

A. In Nogales.

Q. Did you bring the calendar with you today?

A. Yes, I did.

Q. How many days were you in Nogales that week?

A. I was there virtually all week, with the exception of Wednesday.

Q. Do you recall receiving any notice of that hearing?

A. No, I don't.

MR. YOUNG: May I approach the witness, Your Honor?

THE COURT: Yes.

BY MR. YOUNG:

Q. Sir, I'll ask you to refer to what's been marked as Defense Exhibit A. Ask you if you recognize that calendar?

A. Yes, I do.

Q. Is that your calendar from August of 1996?

A. Yes, it was.

Q. And did you refer to it at my request?

A. I did.

Q. On August the 29th, do you have any indication that you have a court hearing on that date?

A. No, I don't.

Q. Have there been any changes made to that calendar

since last August?

A. No.

MR. YOUNG: I'll move for the admission of Defense

A, Your Honor.

MR . GATTO: No objection.

THE COURT: A will be admitted.

(Defense Exhibit A admitted into evidence.)

BY MR. YOUNG:

Q. Along those lines sir, were you present earlier this year at a motion to set aside a judgment which Ms. Walters filed in your case?

A. Could you explain that again?

Q. This year, do you recall a motion being heard by Judge Davis to set aside the judgment in this case?

A. Yes, I have.

Q. And was that held at the same time as I substituted

in as counsel of record for you?

A. Yes.

Q. How did you find out about that hearing?

A. Again, I had no idea that I was supposed to be there. The only way I was notified is by you. You had informed me.

Q. Did I ask you whether or not you were going to be

there?

A. Yes. Asked me, yes.

Q. Do you recall receiving any letters from Ms.

Walters regarding that hearing?

A. No, I don't.

Q. And have you searched -- do you keep a file on this

case?

A. Absolutely.

Q. Have you looked through that file for any letters

from Ms. Walters regarding a hearing on August 29th?

A. Yes.

Q. Did somebody else help you search through that

file?

A. Yes.

Q. Who's that?

A. My wife, Betty Perez.

Q. Is she here today?

A. Yes, she is.

Q. How long have you been married?

A. 14 years -- or going on 14 years, I'm sorry.

Q. If you were present at that hearing, there are two

issues that I would like to ask you about. One is after you

Ot l-AA into the Pima County jail on this case, was there were Do
~~~~ ~~.

a period of time that you spent in the holding cell before
Pretrial Services came to get you?

A. Yes.

Q. And approximately how long was that period of time?

A. Approximately an hour to an hour and-a-half.

Q. Had you over talked to Ms. Walters about that

period of time previously?

A. She never asked. We never discussed it.

Q. And do you recall what time they actually booked
~~~~

you?

A. I believe it was just before 2:00 o'clock.

Q. Could you be mistaken about that?

A. I could be.

Q. Also along those lines, do you recall requesting an attorney that evening?

A. Yes.

Q. And who did you request to allow you to contact an attorney?

A. Well, I requested that of Officer Green.

Q. How many times did you request that?

A. Twice.

Q. Did Mr. -- Officer Green ever give you the opportunity to contact an attorney?

A. No, he didn't.

Q. Did he ever offer you a telephone call?

A. No, he didn't.

Q. Have you reviewed the testimony of Officer Green at that hearing on August 29th?

A. Yes, I did.

Q. Have you seen the part where he ultimately stated

that he did offer you a telephone call?

A. Yes, I did.

Q. And do you disagree with that?

A. Absolutely, I disagree.

Q. Now Officer Green stated that you wished to have an

attorney present. Was that actually the case?

A. I asked to contact an attorney either in person or

by phone.

Q. Would you have liked to have had an attorney

present?

A. Absolutely. I'd love to have an attorney present.

Q. If you were going to have an attorney present, how would you arrange that at that time of night to have an

attorney present?

A. I would have to call them via telephone.

Q. And your testimony is that you did not refuse to

use the telephone?

MR. GATTO: Objection. Leading.

THE WITNESS: I did not

THE COURT: Overruled. He can answer.

MR. YOUNG: That's all I have, Your Honor.
THE COURT: Cross-examination?

MR. GATTO: Thanks, Judge.

CROSS-EXAMINATION

BY MR. GATTO:

Q. Mr. Perez, this incident we're talking about

occurred back in 1993, right?

A. Yes, sir.

Q. September 21st?

A. Yes, sir.

Q. You were drinking alcohol that night, weren't you?

A. Yes, sir.

Q. You testified at two trials in this matter, right?

A. Yes, sir.

Q. The first one was September, October of last year?

A. About that time; yes, sir.

Q. And then the second one was in December?

A. Yes, sir.

Q. And from the two trials you changed your testimony on a number of points; isn't that correct?

A. I can't recall.

Q. Well, let's ask you about the size of your engine. You changed your testimony specifically on the point regarding the size of your engine; isn't that correct?

A. Yes. Q. At the first trial you testified it was -- withdraw that question.

In regard to your testimony on that issue, you alleged your car could not go a hundred miles an hour, correct?

A. That's correct.

Q. The second trial Deputy Green testified that your car had a V-8 engine in it; isn't that correct?

A. That's correct.

Q. And you had testified on two occasions the car only had a V-6. Is that correct?

A. I believed that's what it had at the time.

Q. At the second trial there was an issue regarding your weight, correct?

A. That's correct.

Q. You testified on the night of your arrest you weighed 240 pounds?

A. Approximately.

Q. You were handed -- you also testified that you had weighed approximately 240 pounds for the last six to eight years, correct?

A. Approximately.

Q. Preceding the date of that trial?

A. I'm sorry?

Q. Preceding the date of that trial. So from 1990 to 1996, you hadn't weighed less than 240, correct?

A. Yes, sir.

Q. You were handed at that trial a photo of your driver's license, which represented your weight as 200 pounds, correct?

A. Yes.

Q. That was information you provided to the Motor Vehicle Division regarding your weight. Correct?

A. That's correct.

Q. In regards to the incident that took place the night of your arrest, Deputy Green did allow you an opportunity to make a phone call at Pretrial Services; isn't that correct?

A. No.

Q. He provided you a phone book?

A. No.

Q. Told you there was a phone available at Pretrial Services when you were there, correct?

A. No. He didn't advise me at all.

Q. In regards to your request to have an attorney, you told Deputy Green you wanted to have an attorney physically present for the blood draw; is that correct?

A. Either present or by telephone.

Q. Deputy Green told you you did not have the right to have an attorney present for the draw. Correct?

A. That's what he told me, yes.

MR. GATTO: I dontt have any further questions, Judge.

THE COURT: Any redirect, Mr. Young?

MR. YOUNG: Nothing further, Your Honor.

THE COURT: Okay. Thank you, sir. You can step down. Have a seat with your attorney.

MR. YOUNG: I'll call one other witness, Your Honor. Betty Perez.

BETTY PEREZ,

having been sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

THE COURT: Ma'am, would you have a seat right there, please?

DIRECT EXAMINATION

BY MR. YOUNG:

Q. Ma'am, would you please tell us your name?

A. My name is Betty Jean Perez.

Q. Do you know Fermin Perez?

A. Yes, I do.

Q. Is he the gentleman seated here next to me?

A. Yes. Uh-huh.

Q. How long have you known Mr. Perez? A. Um, I've known him for a long time. We were first introduced at age 16, and we've been married for almost 14

years.
Were you aware of his arrest in 1993 for DUI?

Yes, I was.

And that was the case that we're here on today; is

that right?

A. Mm-hm. Yes.

Q. Since that time have you, along with Mr. Perez, maintained a file regarding that arrest?

A. Um -- yes, I have.

Q. What kinds of things go into that file?

A. I put everything in there that the attorney sends

us .

Q. And what kinds of things do the attorneys send you?

A. They send us letters -- just mostly letters and

motions they make.

Q. At my request did you go through that file with Mr. Perez?

A. Yes, I did.

Q. And were you and Mr. Perez able to find any letters from Tamara Walters indicating that there was a hearing that was going to be held on August 29th of 1996?

A. No. I didn't find anything.

Q. And when did you go through that file?

A. Um, we went through that file just like a week ago, I guess.

MR. YOUNG: That's all I have, Your Honor.

THE COURT: Cross-examination?

MR. GATTO: No cross, Judge.

THE COURT: Thank you, ma'am. You can step down.

* * * * *

CERTIFICATE

I, Terri L. Faust, do hereby certify that I took the machine shorthand notes in the foregoing matter; that the same was transcribed via computer-aided transcription; that the preceding pages of typewritten matter are a true, correct and complete transcription of those proceedings ordered, to the best of my skill and ability.

Terri L. Faust
Court Reporter
Pima County Superior Court
Tucson, Arizona

MOTION FOR RELEASE PENDING APPEAL/MOTION TO VACATE JUDGEMENT/REQUEST FOR HEARING TO DETERMINE VOLUNTARINESS OF ABSENCE FROM EVIDENTIARY HEARING FILED FEBRUARY 19, 1997

The defendant, Fermin Perez, by and through his attorney, Jon Young, hereby requests that this Court grant his release pending appeal pursuant to 17 A.R.S. Rules of Crim.Proc., Rule 7.2(b)(1), as this case will likely be set aside on appeal under McNutt v. Superior Court, 133 Ariz. 7, 648 P.2d 122 (1982), because the arresting officer denied Mr. Perez's right to consult with counsel, both by telephone and in person following Mr. Perez's arrest. Alternatively, Mr. Perez requests that the judgement in this matter be vacated as having been obtained in violation of Mr. Perez's constitutional rights, specifically his right to counsel at the time of his arrest and his right to effective assistance of counsel at the evidentiary hearing held in this matter. Mr. Perez also requests that an evidentiary hearing be held to determine the voluntariness of his absence at the hearing held August 29, 1996.

MEMORANDUM OF POINTS AND AUTHORITIES

MR. PEREZ SHOULD BE GRANTED RELEASE PENDING THE APPEAL IN THIS MATTER AS THERE ARE "REASONABLE GROUNDS TO BELIEVE THAT THE CONVICTION MAY BE REVERSED ON APPEAL" BASED ON THE ARRESTING OFFICER'S ADMITTED DENIAL OF MR. PEREZ'S RIGHT TO CONSULT WITH COUNSEL BY TELEPHONE OR IN PERSON FOLLOWING MR. PEREZ'S ARREST

17 A.R.S. Rules of Crim.Proc., Rule 7.2(b)(1), provides for the release of an accused pending appeal if there are reasonable grounds to believe the conviction may be reversed.

> After a person has been convicted of any offense for which the person will in all reasonable probability suffer a sentence of imprisonment, the person shall not be released on bail or on his or her own recognizance unless it is established that there are reasonable grounds to believe that the conviction may be set aside on a motion for new trial, reversed on appeal, or vacated in any post-conviction proceeding.

A line of cases beginning with McNutt v. Superior Court, 133 Ariz. 7, 648 P.2d 122 (1982), suggests that Mr. Perez's conviction will ultimately be set aside based solely on Deputy Green's testimony at the August 29, 1996, evidentiary hearing held in this matter.

Contrary to the understanding of everyone who appeared at the August 29, 1996, evidentiary hearing in this matter, McNutt v. Superior Court allows an accused to contact his lawyer either by telephone or in person:

> "We agree with the Court of Appeals of New York, which said, 'Law enforcement officials may not, without justification, prevent access between the criminal accused and his lawyer, available in person or by immediate telephone communication, if such access does not interfere unduly with the matter at hand.' People v. Gursey, 22 N.Y.2d 224, 227, 239 N.E.2d 351, 352, 292 N.Y.S.2d 416, 418 (1968)." (Emphasis added.)

McNutt v. Superior Court, 133 Ariz. 7, 9, 648 P.2d 122, 124 (1982). The court went on to state, footnote number 2, "If the lawyer cannot be reached by telephone or cannot promptly appear where the defendant is, the state may continue with its detention procedures." (Emphasis added.) The defendant is entitled to consult with the attorney "before taking a chemical breath test." Kunzler v. Superior

Court, 154 Ariz. 568, 744 P.2d 669 (1987).

Deputy Green repeatedly testified that, following his arrest, Mr. Perez repeatedly stated that he "wanted an attorney right now" or that he "wanted an attorney present." (RT August 29, 1996, p. 12, 13, 14, 15, 16, 18, 19, 21, 22 and 23.) Deputy Green testified to his apparent misunderstanding of a suspect's right to counsel, stating "I had been trained that it was not his right to have an attorney present at the point of the chemical test." (RT August 29, 1996, p. 23.) Deputy Green also testified repeatedly that he told Mr. Perez that Mr. Perez did not have the right to have an attorney present. (RT August 29, 1996, p. 14, 18-19, 22 and 23-24.) Even the prosecutor stated during oral argument, "He's not entitled to have an attorney present . . . ." (RT August 29, 1996, p. 27.)

Because Office Green did not properly understand Mr. Perez's right to consult in person with an attorney, Mr. Perez was denied any attempt to secure that right. Because Mr. Perez's defense counsel had apparently not read McNutt or any of several of the Arizona Supreme Court cases subsequent to McNutt closely enough in preparation for the hearing, she was unable to offer Judge Donfeld any guidance or to cite Judge Donfeld to the appropriate portion of McNutt.

Should Mr. Perez receive a term of probation with the condition that he serve a period of 4 months incarceration in DOC, his incarceration will long since have ended by the time the Arizona Court of Appeals is able to render a decision. It is within the discretion of the trial judge to permit a defendant with a conviction to remain on bond after a judgement and sentence during the pendency of an appeal. State v. Quinn, 10 Ariz. App. 552, 460 P.2d 658 (1969). Alternatively, the court could vacate the judgement pursuant to 17 A.R.S. Rules of Crim.Proc., Rule 24.2 and allow the state to appeal.

THE JUDGEMENT IN THIS MATTER SHOULD BE VACATED AS MR. PEREZ WAS DENIED HIS RIGHT TO CONSULT, IN PERSON, WITH AN ATTORNEY FOLLOWING HIS ARREST AND AS MR. PEREZ WAS DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT THE EVIDENTIARY HEARING IN THIS MATTER

17 A.R.S. Rules of Crim.Proc., Rule 24.2 permits the court to vacate a judgement on the grounds that the conviction was obtained in violation of the United State's or Arizona Constitutions. Mr. Perez was denied the assistance of counsel when Deputy Green, based on his own misunderstanding of the right to counsel, refused to allow Mr. Perez to have an attorney present. McNutt v. Superior Court, supra, prohibits law enforcement officials from preventing access between the criminal accused and his lawyer, available in person, or by immediate telephone communication, if such access does not interfere unduly with the matter at hand. The language in McNutt permitting a defendant to consult with his lawyer in person was repeated in State v. Holland, 147 Ariz. 453, 455, 711 P.2d 592, 594 (1985), in Kunzler v. Superior Court, 154 Ariz 568, 570, 744 P.2d 669, 671 (1987) and in State v. Juarez, 161 Ariz., 76, 80, 775 P.2d 1140, 1144 (1989). See also Ching v. Lewis, 895 F.2d 608 (9th Cir. 1989), reversing grant of summary judgement in § 1983 case and holding that arbitrary policy of denying contact visits with attorney, requiring instead that the prisoner communicate with attorney through hole in glass, or by mail or by telephone, prohibits effective attorney-client communication.

The remedy for such a denial, if the accused has requested an attorney and if the accused is not released immediately after the investigation, is the dismissal of the charges. McNutt, supra; State v. Holland, 147 Ariz. 453, 455, 711 P.2d 592, 594 (1985); State v. Dennett, slip op. No. 1 CA-CR 91-1807 (November 9, 1993). In Holland, as in McNutt, the Supreme Court required that the charges be dismissed as the remedy stating that it is impossible to foresee what advice would have been given the defendant had he been able to confer privately with counsel.

The state seems to indicate, in its written response to Mr. Perez's McNutt Motion filed prior to the evidentiary hearing, that the fact that any consultation with an attorney would have delayed somewhat the DUI investigation excuses Deputy Green's refusal to allow Mr. Perez to have an attorney present. The accused is entitled to such access, however, as long as it does not interfere unduly with the matter at hand. State v. Holland, 147 Ariz. at 464; McNutt v. Superior Court, 133 Ariz. at 9; Kunzler v. Superior Court, 154 Ariz.

at 570; State v. Juarez, 161 Ariz. at 80. Mr. Perez was stopped at 1:05 a.m. and placed under arrest at 1:25 a.m. At that point he began requesting an attorney. (RT August 29, 1996, p. 11-12.) Deputy Green testified that time was not a problem with respect to the 2 hour window for obtaining a blood test. (RT August 29, 1996, p. 20.) As the time factor was not a pressure, and as Deputy Green interpreted Mr. Perez's demand to have an attorney present as a refusal to take the breath test, the request for an attorney could not have presented the prospect of undue delay. If fact, based on Deputy Green's treatment of the request for counsel as a refusal, all that remained at that point was to transport Mr. Perez to the Pima County Jail. The state appears, however, to have abandoned the idea of undue delay at the evidentiary hearing.

Had trial counsel read any of the relevant cases, McNutt, Holland, Kunzler or Juarez, prior to the evidentiary hearing, she could have pointed out to Judge Donfeld that Deputy Green and the prosecutor were both incorrect in their assertions that Mr. Perez was not entitled to consult an attorney in person before taking a chemical test. Based solely on the testimony of Deputy Green, the charges should have been dismissed. The touchstone of an ineffective assistance of counsel claim is whether the defendant was denied a fair trial. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 1052, 80 L.Ed.2d 674 (1984); State v. Valdez, 167 Ariz. 328, 806 P.2d 1376 (1991). The defendant must show first that trial counsel's performance fell below an objective standard of reasonably effective assistance under prevailing professional norms, and second, that trial counsel's performance has prejudiced defendant's case. State v. Valdez, supra. Trial counsel's basic unfamiliarity with the cases upon which she was relying falls below an objective standard. The fact that the language of the cases is outcome determinative establishes the prejudice.

As an alternative to finding trial counsel ineffective, this court could, pursuant to 17 A.R.S. Rules of Crim.Proc., Rule 16.1(d), reconsider Judge Donfeld's previous ruling upon a finding of good cause.

NEITHER RULE 16.1(D) NOR THE DOCTRINE OF LAW OF

THE CASE PREVENTS THIS COURT FROM RECONSIDERING THE EARLIER RULING OF ANOTHER JUDGE

In State v. King, 180 Ariz. 268, 883 P.2d 1024 (1994), the court addressed the application of the doctrine of law of the case and Rule 16.1(d). The court first noted that, despite its general adherence to the doctrine of law of the case, it has recognized it as a rule of procedure, not substance. The court then went to state that:

> "A court does not lack the power to change a ruling simply because it ruled on the question at an earlier stage.
>
> . . .
>
> This doctrine does not prevent a judge from reconsidering his or her previous non-final orders. Plumb v. State, 809 P.2d 734, 739 (Utah 1990). Nor does it prevent a different judge, sitting on the same case, from reconsidering the first judge's prior, non-final rulings. (Citations omitted.) In fact, the court's discretion to reconsider an earlier ruling is reflected in one of our procedural rules, which provides: Finality of Pretrial Determinations. Except for good cause, or as otherwise provided by these rules, an issue previously determined by the court shall not be reconsidered. Rule 16.1(d), Arizona Rules of Criminal Procedure."

State v. King, 180 Ariz. at 279. The court in King then held that the trial judge did not abuse his discretion in reconsidering the ruling of a previous judge suppressing identification testimony. Good cause to reconsider Judge Donfeld's ruling can be found either in the erroneous law presented to Judge Donfeld without the benefit of an opposing defense attorney familiar with the cases upon which she was relying, or good cause can be found to hold the evidentiary hearing a second time with proper notice to Mr. Perez to allow him to appear and confront Deputy Green, to assist in cross examination and to testify

on his own behalf.

MR. PEREZ'S LACK OF NOTICE OF THE EVIDENTIARY HEARING IN THIS CASE DENIED MR. PEREZ THE RIGHT TO CONFRONT WITNESSES AGAINST HIM, DENIED MR. PEREZ HIS DUE PROCESS RIGHT TO BE PRESENT AT ALL STAGES OF THE PROCEEDINGS AND DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Mr. Perez was not present at the evidentiary hearing held in this matter on August 29, 1996, solely because he did not receive notice of the hearing date.[4] Because of his involuntary absence from the hearing, Mr. Perez was unable to confront the witness, Deputy Green, he was unable to rebut the testimony of Office Green and he was unable to assist his trial counsel in further cross-examining Deputy Green.

Deputy Green offered two critical pieces of testimony which Mr. Perez was unable to confront or to rebut. The first was Deputy Green's testimony that Mr. Perez had the opportunity to request one phone call from jail personnel when he was booked into the Pima County Jail. (RT August 29, 1996, p. 16.) Had Mr. Perez been present at the evidentiary hearing, he would have pointed out to trial counsel that Deputy Green left him at the Pima County Jail in a holding cell and it was well over an hour before jail personnel removed him from the holding cell for booking. A fact easily verified by reference to Mr. Perez's booking sheet which shows him being booked into the Pima County Jail at 2:47 a.m. (Trial counsel further exhibited her lack of familiarity with the McNutt line of cases by failing to point out to the court that both Kunzler and State v. Juarez, 161 Ariz. 76, 775 P.2d 1140 (1989), allow the accused to consult an

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While a letter may have been sent to Mr. Perez, neither he nor his wife ever received it, it is not in the file he and his wife have kept, and it is not reflected in his 1996 calendar. Furthermore, the letter does not indicate that there will be witness testimony nor does it indicate that Mr. Perez should be present.

attorney before deciding to take a chemical test. By the time Mr. Perez was booked, Deputy Green had advised him of his license suspension for refusal to take a chemical test, completed his paperwork and left the jail.) Judge Donfeld obviously was not informed that the license suspension had already been served and the investigation completed by the time that Mr. Perez was booked as Judge Donfeld commented during argument that Mr. Perez could have elected the breath test while at Pre-Trial Services. (RT August 29, 1996, at p. 29-30.)

Most damaging to Mr. Perez was Deputy Green's surprise testimony, in Mr. Perez's absence, that he had offered Mr. Perez the opportunity to call an attorney. (RT August 29, 1996, at p. 21.) Although Deputy Green quoted Mr. Perez's exact words in requesting an attorney at several points in his police report (RT August 29, 1996, p. 13, 16.), Deputy Green never mentioned in his police report offering a phone call to Mr. Perez or Mr. Perez refusing a phone call. (RT August 29, 1996, at p. 22.) When interviewed by trial counsel, Deputy Green made no mention of offering Mr. Perez a phone call. (RT August 29, 1996, at p. 22.) In fact, when asked during the interview "and what opportunity did you provide him to contact this attorney?" Deputy Green replied "Well, at that point, I took him to jail because he said earlier while we were in the vehicle, he said, I want an attorney before I take any tests of my blood." (RT August 29, 1996, at p. 29.)

Deputy Green's recollection of this key issue occurred after both direct and cross-examination had been completed in the evidentiary hearing. During examination by trial counsel, Deputy Green stated that after the first request for an attorney, what he did next was to ask Mr. Perez if he would submit to a chemical test. (RT August 29, 1996, at p. 12.) After the next request for an attorney Deputy Green stated that what he did was to tell Mr. Perez that he was not permitted to have an attorney present during the testing. (RT August 29, 1996, at p. 14.) When questioned by trial counsel as to what opportunities he gave Mr. Perez to contact an attorney, Office Green testified he had no opportunity at the scene to let Mr. Perez contact an attorney. (RT August 29,1 996, at p. 14.) He also testified that, while he was driving past public telephones, he did not stop to

let Mr. Perez use the telephone. (RT August 29, 1996, at p. 14-15.) When the court inquired as to whether Mr. Perez was given the opportunity to call an attorney at the jail, Deputy Green still had no recollection of offering to allow Mr. Perez to call an attorney and stated that the jail personnel would allow one phone call. (RT August 29, 1996, at p. 16.) During examination by the prosecutor, Deputy Green was asked:

> Q: At any time post-arrest, did you offer the defendant an opportunity to make a phone call to an attorney?
>
> A: Not while I was at Pre-Trial Services. I honestly don't recall.

(RT August 29, 1996, at p. 19.) It was only after trial counsel for Mr. Perez established that Deputy Green was under no time pressure to complete the chemical tests within 2 hours and phone calls would have taken 5 to 10 minutes that Deputy Green suddenly recalled offering Mr. Perez the opportunity to call an attorney. (RT August 29, 1996, at p. 21.) (Even so, Deputy Green's testimony was that Mr. Perez wanted an attorney present and Deputy Green did not think that Mr. Perez had the right to have an attorney present. Even by Deputy Green's newly recovered memory, Mr. Perez's right to counsel was denied.) Deputy Green subsequently lost his newly recovered memory after the evidentiary hearing, testifying at the first trial that he gave Mr. Perez an opportunity to use the phone only by taking him to jail:

> Q. What opportunity did you give him at any time to contact an attorney?
>
> A. I informed him that phones were available at pretrial services for him to make a phone call if pretrial would allow that.

(R.T. September 6, 1996, p. 72)

Given the previous inconsistencies in Deputy Green's testimony, reports and interview, given the sudden motive to fabricate upon being pinned down as to the lack of any time pressure, and given Deputy Green's failure to recollect the crucial issue at any point earlier in the proceeding, or during his interview or in his police report, Deputy Green's deception of Judge Donfeld is readily apparent. Had Mr. Perez been present at the evidentiary hearing, Mr. Perez would have testified that, at no point, did Deputy Green ever offer him the opportunity to make a phone call.

The right of a defendant charged with a felony to be personally present in the courtroom at every stage of his trial conducted is fundamental to our system of justice. "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner." Lewis v. United States, 146 U.S. 370, 372, 13 S.Ct. 136, 137, 36 L.Ed. 1011 (1892). This principle has been constantly upheld and continually reaffirmed. Hopt v. Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884); Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). One of the most basic of the rights guaranteed by the confrontation clause is the accused right to be present at every stage of his trial. Lewis v. United States, supra. The Supreme Court has also stated that a defendant "has a due process right to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." Kentucky v. Stincer, 482 U.S. 730, 745, 107 S.Ct. 26, 58, 96 L.Ed.2d 631 (1987). The court in Stincer also stated that a defendant is constitutionally "guaranteed the right to present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." Stincer, 482 U.S. at 745.

The right to be present at trial is protected by the due process and confrontation clauses of the Sixth Amendment to the United States Constitution and by article II, §§ 4 and 24 of the Arizona Constitution. State v. Levato, 924 P.2d 445, ____ Ariz. ____ (1996). 17 A.R.S. Rules of Crim.Proc., Rule 9.1, permits the inference that a defendant is voluntarily absent from a proceeding, thus waiving his

rights to confrontation and due process, if the defendant had personal notice of the time of the proceeding, the right to be present at it, and a warning that the proceeding would go forward in his or her absence. The Ninth Circuit Court of Appeals has found that Rule 9.1 "comports with the requirement of a waiver of the defendant's constitutional rights provided that the defendant is affording a hearing to determine whether his absence was, in fact, voluntary." Brewer v. Raines, 670 F.2d 117, 120 (9th Cir. 1982). The trial court must, if asked, determine whether the defendant's absence was, in fact, voluntary. State v. Sainz, ____ Ariz. ____, 924 P.2d 474 (App. 1996).

In State v. Bishop, 139 Ariz. 567, 679 P.2d 1054 (1984), the court remanded for a new competency hearing where the record was insufficient to conclude that the defendant was aware of the nature of the third and fourth days of his Rule 11 hearing when he refused transportation from the jail to court. The new hearing was to be held either in the defendant's presence or with his presence to have been found properly and voluntarily waived. Mr. Perez similarly requests that the evidentiary hearing in this matter be held in his presence as he maintained constant contact with both his attorney and Pre-Trial Services and yet never received notice that the hearing was being held and cannot, therefore, be said to have waived his right to confront Deputy Green and to be present to testify and to assist his attorney at the hearing.

Respectfully submitted this 17th day of February, 1997.

AFFIDAVIT ATTACHED TO MOTION TO VACATE JUDGEMENT/MOTION FOR NEW HEARING MOTION FOR RELEASE PENDING APPEAL/MOTION TO VACATE JUDGEMENT/REQUEST FOR HEARING TO DETERMINE VOLUNTARINESS OF ABSENCE FROM EVIDENTIARY HEARING

I, Fermin C. Perez, upon my oath depose and state that:

1. Am the defendant in CR-52507.

2. I have, at all times, kept both Pre-Trial Services and the Law Offices of Tamara Walters advised of my address and telephone number, including voice mail.

3. I have personally appeared in the Pre-Trial services' Office at least once a week during the entire time that I have been released to the custody of Pre-Trial Services. During August, 1996, I appeared in the Pretrial Services Office twice a week.

4. At no time did I receive notice of the evidentiary hearing held August 29, 1996, from either Pre-Trial Services or from my court appointed attorney.

5. Had I been advised of that evidentiary hearing I would have appeared at the hearing.

6. Had I appeared at the hearing, I would have testified that, at no time, did Officer Green ever offer to allow me to use the telephone.

7. Had I been informed of and appeared at the evidentiary hearing, I would have also informed my defense attorney, for purposes of further cross-examination of Officer green, that I spent at least one hour in a holding cell at the Pima County Jail after being transported there by Officer Green and before bi\eing booked into the jail by Pre-Trial Services.

FURTHER AFFIANT SAYETH NOT.

DATED this 14th day of February, 1997.

FERMIN C. PEREZ

REPORTER'S TRANSCRIPT OF DECEMBER 16, 1996.

PROCEEDINGS
THE COURT: 52507, motion for reconsideration.

MR. GATTO: Michael Gatto for the DUI team for the State.

MS. WALTERS: Tamara Walters appearing for Fermin Perez, out of custody, not present. I'll

waive his presence for this hearlng.

THE COURT: Okay. What -- I've read your motion, but what have you presented differently than what I already heard?

-MS. WALTERS: Well, I believe that the other -- my client didn~t testify at the motion hearing and he did testify at trial. So he made comments that you weren't -- didn't have in front you at the time of the motion hearing that he had asked for an attorney. Not that he specifically requested an attorney to be present at the time of testing, but he had made two requests to contact an attorney.

And, once again, I think the testimony of Deputy Green at the trial further substantiates my position that he did not allow Mr. Perez any type of reasonable opportunity to contact an attorney or place a call to an attorney.

I think the motion hearing, from my impression in the court, Deputy Green made a statement out of the

blue, which was unexpected to me: He told Mr. Perez he could call an attorney.

And I had brought to the Court's attention that I believe that to be just testimony that had
been created while he was on the stand, because it
hadn~~t come up in the police report, it hadn't come
up in a previous interview of Deputy Green, and once
again, from the review of the trial transcript, it did not come up during the trial when he was asked
numerous times by Mr. Gatto and myself what
opportunities were given.

The only opportunity that he states that
he gave my client to contact an attorney was at
after he had taken him to the Pima County Jail, to
pretrial services. And he told him that my client
would have to contact the personnel at pretrial~and
ask to use a telephone. And Deputy Green had sat
there for at least 30 minutes filling out paperwork
at the jail, while my client was sitting in the
cell, and never made an opportunity -- never made any effort to have my client have any contact with
the telephone.

And it's not -- you know, according to the
case law, the officer who's doing the investigation has to provide the suspect or defendant with an opportunity to place a call, not someone at pretrial services who has no interest in the case. So it deprived him of his right to have any access to a
telephone.

He had driven by several pay phones.
And even at pretrial services, there was
still an hour and a half before the two-hour time frame would have expired, so the officer testified there was absolutely no delay~~ in the investigation

or opportunity to make a call.

Now, the officer testified that my client
asked to have an attorney present during the test,
but it's just -- I mean, how is he supposed to have
an attorney present unless he calls an attorney? I mean, the officer
didn~~t even know he could get a search warrant to obtain blood,
so I believe the
officer was not aware of, you know, the rights that
a client has to have access to an attorney or
contact an attorney.

I think the officer -- my client said, "I

want an attorney present," and he got him into the car and was
taking him to get a blood test. So at
that time it wasn't a refusal. And my client again
asked to have an attorney present, and I guess the
second time the officer said that's a refusal. The
officer incorrectly deemed that to be a refusal,
because he didn't even let him make a phone call.
I just think it's an egregious violation
of my client's rights. And you know, there are
other cases that I cited, and the facts in those
are, you know -- these -- some of them, the client
was able to contact an attorney, and the court said,
Well, the officer didntt interfere because they used
a cell phone and offered a cell phone. And the
answering service was going, Call back, so there
were opportunities to make the call.
Here, he wasn't even taken to a phone
call -- to a phone to make one call. And then he
could have discussed with his attorney whether he
could have been present or whether he should take
he test.

And the officer also says, Well, you know

if he asked for Harold Hyams, he's a personal injury lawyer, the officer is not in a position to decide which attorney my client can contact. And there are attorneys that have different areas of practice or could give some advice or refer them to someone else.

So the officer was jumping to conclusions, making inaccurate assumptions, and deemed this to be a refusal. And as a result of that, my client was not able to get his blood test, which he stated -I mean, the officer said no, he didn't refuse to take a blood test. He did want a blood test.- Even when they passed TMC, my client said, Aren't you going to take me there to get a blood test? It's very clear

my client wanted a blood test. And he wasn't given _ that opportunity to get that or an independent blood test. He wasntt informed of that.

And of course, he's booked in the jail andcouldn't have left to get a blood test; therefore he was deprived of exculpatory evidence, deprived of the opportunity to present other evidence at trial and get a fair trial. And the only remedy is for a dismissal of the charge.

I mean, that -- when this is such an egregious violation from the officer, and such an apparent deprivation of his right to contact an attorney, when there is no -- there is -- I mean, my client does not refuse, and there was plenty of time, that this charge must be dismissed. So that's what I'm asking the Court to do.

THE COURT: Thank you.
Mr. Gatto, did you file a written opposition?

MR. GATTO: No, Judge, I did not. The motion hearing and the trial are totally separate issues. I mean, at trial this information was irrelevant. It's not lodged in the transcript that Ms. Walters had prepared, but I lodged numerous objections to this line of questioning. And I didn't explore those issues on cross-examination or actually, what would be redirect examination, because of the fact that in a trial versus suppression hearing, the issues are much different.

The testimony at the evidentiary hearing that you presided over, Deputy Green says he offered a blood test, and the defendant said yes, I want to

have a blood test. But I want to have an attorney. And after informing the defendant he did not have a right to have the attorney present at the blood draw, but you can make contact, he did not. After he was taken to pretrial services, the defendant was offered a phone book and the opportunity to use a phone. Those were, what I believe, the dispositive facts on the Court's ruling.

You didn't issue a minute entry stating the factual and legal conclusions, but the evidence at the prehearing -- when he -- when they got to pretrial services and he was given an opportunity to use the phone, he did not do so. And that's an implicit waiver of his rights to gather this evidence.

And I think that the distinctions between the trial testimony and the evidentiary hearing, from my standpoint, are defended by the fact that I didn't have the same motivations to ask these types of questions. I'm in a jury trial; I'm trying to

prove various elements that are completely different from what's going on at the suppression hearing. That's why I didn't go into this.

But even the testimony that she elicits regarding her own client, she wants to cite him as authority for what went on in the brief portions of the transcript listed. He, a couple times, says he can't remember. Yet he is crystal clear on what he feels is dispositive to his case regarding the suppression motion.

First thing is he can't recall -- this is -- it looks like 125, but I don't have a page because the motion isn't numbered, and then it

concludes another situation where he doesn't remember. This is three years old, learly the defendant -- he had admitted to drinking that evening.

And in regards to the credibility issues, you had an opportunity to evaluate Deputy Green's testimony in person.

With that, I'-ll submit it for your discretion.

THE COURT: Ms. Walters.

MS. WALTERS: Yes, your Honor, I believe Mr. Gatto is confusing this case with another one that he might have had when he stated that my client said he didn't want a blood test. -And that is not correct.

And Deputy Green in his testimony even

stated that my client said -- my client never refused a blood test or didn't want to take a blood test.

And my client was not offered a telephone book or a telephone at pretrial services. He was merely told when pretrial services interviewed him, to ask them about using a phone. But he was sitting in his cell for at least 30 minutes while Deputy Green was right there at the pretrial servlces area, and he testified that he himself never provided him with the phone or a phone book, nor did pretrial services, because they had contact with him after Deputy Green left. So I just want to clarify those facts.

And you know, I believe that, you know, the case law further substantiates my request to dismiss the case - the charge against him, because the officer -- if there was some ambiguity in my clientts request, it should have been clarified by the officer. And I_mean -- and it could have been clarified very easily by him being taken to a telephone and letting him make a phone call. Five minutes, when he has an hour and a half to go before~ the two hour period is expired, it's minimal effort on the officer. And he didn't even do that.

And even a~t pretrial services, after he said, "You've refused," he's still considering letting the guy make a phone call. He still has an hour and a half to get a blood test, but he makes no effort to get the telephone to him or take him to a phone. And I know that that is possible, because I've had other cases where people have contacted the officers from pretrial services. They may not have a private room, but they do have a desk and a phone and a phone book. And that's

happened in the past with other cases.
So the officer just didn't want to give my client a right to contact an attorney. And he also -- you know, if he advised my client that he couldn~~t have an attorney present, he might have been misleading him. He never said, "You have a right to make a telephone call, but you don't have
the right to have him present."

So he didn't clarify that to my client, and that was misleading and confusing to my client. And therefore, if my client is supposed to know the law more than the officer to say some magic words to trigger the officer to say, "Oh, yeah, okay," then
he's invoking his right.
He did say on two occasions that he wanted
to have an attorney, and the officer said, "You dontt have a right to have an attorney present," but he didntt sayt "You can contact him by phone, and
here is a telephone." So it's just -- you know, the
officer just didntt do what he should have done.

THE COURT: Thank you.
I'm going to deny your motion to reconsider the motion to dismiss.
itss set for trial on Thursday?

MS. WALTERS: Yes.

MR. GATTO: Yes, Judge
THE COURT: Okay. I understand we have 25
cases backed up this week, so whether it actually
gets tried or not is up to the people on the 9th
floor, I

MS. WALTERS: Okay. I might, just for the Court's information -- Mr. Gatto, I have a witness
that's scheduled to come on the 20th, an expert
witness. And if the trial doesn't go this week, he
is not azailable for a rollover next week. So we'd

have to reschedule it for a later date and time that would be available.

MR. GATTO: I don't know who-we take that up with, Judge, but I've received a letter disclosing Mr. Palmer as an expert reference this case.

THE COURT: Well, I would say why don't we do this: You should know Wednesday afternoon what the likelihood is of your going to trial. If you're not going to get in, why don~~t you enter into a stip for a new date and I'll sign it. And that will get it off of rocket -well, at least get it off of the
rollover. So you can come up with a date.

MS. WALTERS: He's pretty busy until the

end of January or into February.

MR. GATTO: I believe we'll be able to
work something out.

THE COURT: Work it out, and that will cut
red tape for you.

MR. GATTO: All right.

THE COURT: Thank you.

(Proceedings concluded.)
CERTIFICATE
STATE OF ARIZONA)

) ss.

COUNTY OF PIMA

I, Cheryl Austin, do hereby certify

that as an Official Court Reporter for the Pima
County Superior Court, I reported the foregoing proceedings to the best of my skill and ability; and
that the same was transcribed under my supervision
via computer-aided transcription: and that the
foregoing pages of typewritten matter are a true, correct, and
complete transcript of alL0the
proceedings had as set forth in the title page
hereto.

CHERYL AUSTIN, CSR, RPR
CSR No. 10318 (CA)
Official Court Reporter

date

My Commission Expires:

January 31, 1998

DECEMBER 4, 1996, MOTION TO RECONSIDER/MOTION TO DISMISS

COMES NOW the Defendant, by and through his counsel undersigned, and respectfully moves this Court to dismiss the charges now pending against Defendant because his constitutional right to counsel was violated. Furthermore, this Court is requested to reconsider its prior ruling denying Defendant's Motion to Suppress Statements, Motion to Dismiss (Denied Counsel), and Motion to Dismiss (No Independent Blood Test) and dismiss these charges.These Motions are supported by the attached memorandum of points and authorities and exhibit X.
RESPECTFULLY SUBMITTED this day of December, 1996.

TAMARA R. WALTERS

Attorney for Defendant
MEMORANDUM OF POINTS AND AUTHORITIES FACTS:

On August 16, 1996, Defendant filed a Motion to Dismiss (No Independent Blood Test) and Motion to Suppress Statements, Motion to Dismiss (Denied Counsel) on the grounds that Defendant was denied a reasonable opportunity to contact his attorney. A motion hearing was held August 29, 1996, and both motions were denied. As well as asking the Court to reconsider this ruling, Defendant is raising a separate Motion to Dismiss for denial of counsel to cover all bases thoroughly.

A review of the police report prepared by Deputy Greene (the arresting officer with the Pima County Sheriff's Office), Deputy Greene's testimony at both the motion hearing and the trial, and Defendant's testimony at the trial, will clearly demonstrate that Defendant's right to counsel was violated, justifying a dismissal of all charges.

POLICE REPORT:

Defendant was stopped at 0058 hours on September 21, 1993 by Deputy Greene. Defendant performed field sobriety tests and was placed under arrest at 0125 hours. Miranda warnings were read at 0130 hours. According to the report, Defendant indicated that he did not understand his warnings and would not waive his rights. He stated, "I want an attorney right now. Harold Hyams," (OWS) and "I want an attorney before I do any test, right now." (OWS). The officer further reports, "After the tests were completed, I placed Perez under arrest. I gave Perez a choice in chemical tests and he said "Blood". (OWS). AB we were driving to the hospital, A/Perez insisted on having an attorney preeent immediately.^ A/Perez would,
not complete a test without one saying, "I don't trust you guys." (OWS). A/Perez had also asked for an evaluator (wife, attorney, etc.) to be present at the field sobriety test.

Deputy Greene stated that Defendant refused to take a blood test. He

was taken directly to the Pima County Jail.

MOTIONS HEARING:

Deputy Greene testified that after he advised Defendant of his Miranda warnings, and he made the statements set forth above in Police Reports, he asked Defendant if he would submit to a chemical test (p. 12) at about 1:30 and he said blood. (p. 13).

Q And did you take him to the blood test?

A I put him in the vehicle and began to transport him

to the hospital. Mr. Perez then said -- quotes -- "I want an attorney present while I do the test" -- unquote. (p. 13)

Q En route, did the defendant say he wanted to do a blood test?

A Yes, sir.

Q Also, he tells you he will not do the test unless he has an attorney present; correct?

A Yes, sir. (p. 18)

Q After the defendant told you that he wanted an attorney present for the test, what did you do?

A I advised him that he wasn't -- it's not his right to have an attorney at the test, but he could call an attorney and talk to one, and he adamantly wanted an attorney present during the test.

Q After that conversation, what did you do?

A I began to transport him to the Pima County Jail.

Q At any time post-arrest, did you offer the defendant an opportunity

to make a phone call to an attorney?

A Not while I was at Pretrial Services. I honestly don't recall. (p. 18, 19)

Q When he asked -- okay. When he asked to have an attorney present and you were on the way to the hospital, would it have delayed your investigation if you would have allowed him to make a phone call to an attorney?

A I can't testify to that. I have no idea. I don't know how long the phone call would have taken, if he would have had an attorney that he wanted to talk to. He said Harold Hyam<, a personal injury attorCey. I honestly don't know.

Q But you had time, didn't you, to take him to a phone and let him make a phone call. I mean, the time wasn't running out where it was no longer time for taking the blood sample?

A Are you trying to find out if I was pressed for time to get a chemical test of his bodily substance?

Q Well, yeah, that was part of my question.

A I didn't see that as a problem, no.

Q So the time frame wasn't a problem to get the test?

A No.

Q But how about allowing him to make a phone call to try to contact an attorney? Did you have sufficient time for that?

A Again, I don't know. I don't know if that would have delayed it to the point where I would have had to be past that two hour time limit. I have no idea.

Q But it would have taken him five to ten minutes to make a few phone calls?

A He could have stopped and made that determination at that point.

Q You didn't allow him that opportunity; is that correct?

A He wanted an attorney present. I offered him the attorney, to call an attorney, or the opportunity to call an attorney. He wanted an attorney present.

THE COURT: You did ask him if he wanted to make a phone call?

THE WITNESS: Yes, I did.

THE COURT: And at what point did you do that?

THE WITNESS: In the vehicle after he told me that he wanted an attorney present during the chemical testing.

Q (By Ms. Walters) So it's now your testimony that you told him that he could make a phone call?

A I advised him that he was not allowed to have an attorney present during the chemical testing. I then told him he could make a phone call to talk to an attorney, but he did not have the right to have an attorney present.

Q Okay. But that's a change in your testimony. So now you're saying that you told him he could make a phone call?

A I answered that before.

Q And is that in your police report?

A No.

Q It was -- did you mention that when we had our interview on August 21, 1996?

A I don't think 80.

Q But now all of a sudden, you remember that you gave him or told him he could make a phone call?

A Yes.

Q And did he say, "I'll make a phone call"? Did you give him any opportunity, take him to a phone?

A No. He said, "I want an attorney present."

Q Did he specifically 6ay, "I don't want to make ia phone callt"

A No, he didn't.

Q And assuming his attorney could have been there at the hospital and that he was at the hospital in a reasonable period of time and not to delay the proceedings, it would have been possible to have his attorney present; isn't that correct?

A I had been trained that it was not his right to have an attorney present at the point of the chemical test. (p. 2023)

MS. WALTERS: Well, your Honor, I still am reviewing it, but on page 40, when I'm asking him, I asked him, "And what opportunity did you provide him to contact this attorney," and he replied, "Well, at that point, I took him to jail because he said earlier while we were in the vehicle, he said, 'I want an attorney before I take any tests of my blood.'" So I asked him specifically, "What opportunity did you provide him to contact an attorney" and he didn't make any statement that he gave him an opportunity to make a phone call. (p. 29)

MS. WALTERS: 44. Excuse me.

-- at the jail, and I asked him, "Did you go -- A. formally go through the admin per se and implied consent affidavit?" "No."

"And then what opportunity did you give him to contact his attorney when he was at Pretrial Services?" "I told him, 'You're more than welcome to use the phone here if the Pretrial Services people will let you make a phone call.'" And that's the first time that he's ever mentioned giving him an opportunity to make a phone call.

"And did you specifically provide him with a phone, he -you just left that up to Pretrial Services?" "That's correct."

His request to make a phone call. "Did you provide him with a phone book or anything like that?" "No".

And then I went through the same questions I asked today, "Would you offer him an opportunity to call the different places," and he said, " No," and never once until now did he state that he told him he could make a phone call. (p. 30 31)

TRIAL TESTIMONY OF DEPUTY GREENE:

Q After arriving at the Pima County Jail, did you give the defendant an opportunity to place a call to an attorney?

A I told him that phones were available at pretrial services if personnel would let him use them.

Q At the jail, after informing the defendant of the availability of a phone, did the defendant make any calls?

A No, he did not. (p. 29-30)

. . .

Q All right. And you had advised Mr. Perez as part of Miranda warnings that he had the right to the presence of an attorney to assist

him prior to questioning; is that right?

A Correct.

Q And did he request an attorney after you read him those rights?
A He said, quote, I want an attorney right now, Harold Hyams, unquote. Or words similar.

Q Did he at any other time request an attorney?

A Yes.

Q When was that?

A After I advised him that he was not able to have an attorney present during the test he said, quote, I want an attorney before I do any test right now, unquote, or words similar.

Q When did you advise him that he could not have an attorney present during the test?

A After I advised him of the admin per se.

Q That was at the scene?

A I paraphrased the form at the scene.

Q Was that before you placed him in the patrol car?

A No, that was while he was in the patrol car.

Q You did not read him the form that you read to the jury, you just paraphrased it?

A As described, yes.

Q When you advised him of his admin per se affidavit did he state

that he would take a test?

A Yes.

Q Which test would he take?

A Blood.

Q Did he state that after you had advised him that he could not have an attorney present?

A No.

Q Did he at any time specifically tell you that he was refusing to take a blood test?

A No. (p. 63-65)

Q Deputy Greene, when we left off yesterday we were talking about the refusal to take the blood test as you deemed it and the right to an attorney. I am going to continue with my questioning on that. So to repeat and bring us up to date, Mr. Perez requested an attorney; is that correct?

A That's correct.

Q Any you were transporting him to El Dorado Hospital to get a blood test after he agreed to take a blood test; is that correct?

A That's correct.

Q And how far did you get to, well, from where you were located on the map which route did you take to the hospital?

A Would you like me to show you?

Q Yes, if you could approach.

A I left the scene and I began to travel south on Craycroft, my intention was to go eastbound on River, that has proven from experience to be the quickest way to El Dorado Hospital.

Q And you are using a black marker?

A That's correct.

Q Where is El Dorado Hospital in relation to this map?

A El Dorado i8 over on Wilmot, off the map, actually.

Q If you could just maybe draw a little square with
hospital and then point an arrow as to which direction it would be. Thank you. You can have a seat. And where were you in route to the hospital when you decided that Mr. Perez had refused to take a blood test?

A When Mr. Perez told me that he wanted an attorney present at the test we were just north of Territory, I think.

Q And that's the second time that he had told you that he wanted an attorney present; is that correct?

A Yes, I believe so.

Q So the first time he asked to have his attorney present you did not deem that as a refusal, correct, because you were taking him to the hospital?

A I instructed him that he had the opportunity to talk to an attorney but not to have an attorney present.

Q Okay. Then you changed your mind near Territory and that's, Territory is just south of Sunrise, is that correct?

A It is probably about a quarter of a mile south or maybe half a mile

south.

Q And then where did you take Mr. Perez?

A Directly to pretrial services at the Pima County adult detention center.

Q And how did you get, which route did you travel?

A Craycroft to 22nd, I believe, 22nd to Santa Cruz, Santa Cruz south to the Pima County Jail.

Q So you went south on Craycroft covering the same area where you had travelled with Mr. Perez earlier past River?

A That's correct.

Q And you passed the Abco shopping center area?

A Yes, I did.

Q And that's where there is a telephone at Walgreen's?

A There's a telephone at Abco. I don't know if there is one at Walgreen's.

Q Along your route did you pass other public telephones?

A Probably, there's several gas stations, Circle K's.

Q Did you pass TMC also?

A Yes.

Q And that's on Craycroft?

A Yes, it is. No, it is on Grant just west of Craycroft.

Q Did you stop at any of those telephones and allow Mr. Perez to make a telephone call to his attorney?

A No.

Q What opportunity did you give him at any time to contact an attorney?

A I informed him that phones were available at pretrial services for him to make a phone call if pretrial would allow that.

Q And pretrial services is located at the Pima County jail; is that correct?

A That's correct.

Q Had Mr. Perez been booked into the jail at that point?
MR. GATTO: Objection, irrelevant. THE WITNESS: Not at that point, no. THE COURT: No, I will allow the answer to stand. MS. WALTERS:

Q Did you offer a telephone to him at pretrial services or make a phone available?

A Physically taking a phone to him?

Q Or take him to a phone?

A No, there was no phone that reached one of the cells so I couldn't have done that.

Q Could you have taken him out of a cell and taken him to a phone?

A If he had requested it, yes.

Q But you did not do that?

A No, I didn't. (p. 69-73)

Q What opportunity had you given him to this point to contact an attorney?

A As I said when we got to pretrial services I told him that a phone was available if pretrial services personnel would allow him to use that phone.

Q Was that before you read him this affidavit?

A As soon as I put him in his holding cell.

Q Did you contact pretrial services to make any arrangement for them to get him a phone?

A Pretrial services conducts an interview with each person we take in there. I'm assuming that Mr. Perez could have asked for a phone during that interview.

Q Were they interviewing him prior to you reading this form?

A No.

Q So therefore he didn't have an opportunity to request a phone from them first; is that correct?

A No. (p. 79)

Q How long did you stay at pretrial services after you brought the defendant there?

A Probably 30 minutes.

Q And during that time were you doing paperwork regarding this investigation?

A Yes, I was. (p. 82-83)

TRIAL TESTIMONY OF DEFENDANT:

A The second time I asked for an attorney was after he arrested me. I said I would like to contact an attorney.

Q Was that before or after he read you your Miranda warnings?

A That was, I can't recall, ma'am.

Q When you asked for an attorney do you recall the specific words that were used?

A Yes.

Q What were those?

A I would like to contact an attorney.

Q Did you insist that you have an attorney be preAent with you?

A I did not.

Q Did you insist that you have an attorney be present right now?

A I did not.

Q Did you at any other time ask for the assistance of an attorney?

A I did not.

Q So only twice you asked?

A Those two times.

Q Do you recall the officer advising you that you did not have the right to have an attorney present?

A Could you ask that again?

Q Do you recall the officer advising you that you did not have the right to have an attorney present?

A He never said that.

Q Did the officer at any time tell you that you could not have an attorney?

A I told the officer I wanted to contact an attorney. He put me in the car and I was under the understanding that I was going to contact an attorney. (p. 29-30)

Q Did you agree to take the blood test prior to you getting into the car?

A Yes.

Q And after you got into the car, what was your impression as to where you were going to?

A I thought we were going to TMC.

Q Did you at any time change your mind and refuse to take a blood test?

A No, I wanted a blood test.

Q Did you ask for a blood test at another point after the first time?

A Only after we passed the hospital, I said am I not going to take a blood test, that's the only time.

Q When you say you passed the hospital?

A We passed TMC, Tucson Medical Center, I told the officer, am I not going to take a blood test.

Q Were you taken to TMC for a blood test?

A No, he took me right to the jail.

Q Did the officer advise you or tell you that you were not going to get a blood test?

A He told me I refused.

Q Had you refused to take a blood test?

A Absolutely not. It is the only thing that would prove my innocence. (p. 32-33)

Q Were you given an opportunity to make a telephone call to an attorney?

A No.

Q At any time during your contact with Deputy Greene were you given an opportunity to have a phone call?

A Never.

Q When you arrived at the jail, were you given an opportunity to call an attorney by Pretrial Services?
A Never.

Q Do you remember the officer telling you that you would have to make arrangements for the phone call through Pretrial Services?

A I don't recall. (s. 34)

LAW:

When an accused requests counsel, the request must be scrupulously honored. Edwards v. Arizona, 4S1 U.S. 477 (1981); Rhode Island v. Innis, 446 U.S. 291 (1980); State v. Finehout, 136 Ariz. 226 (1983). In fact, the Supreme Court has stated:

If the individual states that he wants an attorney, the interrogation must cease until an attorney i8 preAent. At that time, the individual must have an opportunity to confer with the attorney and to have him preRent during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent. Finehout, supra, at 230 (quoting Miranda v. Arizona, 384 U.S. 436 at 474 (1996)).

The appropriate remedy is dismissal of all charges. Due to the officers actions Defendant was prevented from obtaining exculpatory evidence in the form of an independent test of his breath or blood administered by someone that he chooses. Defendant was held in jail overnight and released the next day. Defendant was also unable to receive advice of counsel which hindered his ability and the ability of his attorney to adequately prepare for this case. If Defendant was allowed to contact his attorney he would have been able to receive advice regarding an independent test, and other advice regarding the rights pursuant to 4th, 5th, 6th and 14th amendments.

We agree with the Court of Appeals of New York, which said, "[L]aw enforcement officiala may not, without justification, prevent access between the criminal accused and his lawyer, available in person or by immediate telephone conversation, if such acces6 does not interfere unduly with the matter at hand." People v. Gursey, 22 N.Y.2d 224, 227, 239 N.E.2d 351, 352, 292, N.Y.S.2d 416, 418 (1968)...In the instant case, the state offered no justification for denying petitioner's request to call his attorney, the attorney was available by telephone, and petitioner's call would not have unduly delayed the DWI investigation and arrest...Dismissal of the case with

prejudice is the appropriate remedy because the state's action foreclosed a fair trial by preventing petitioner from collecting exculpatory evidence no longer available McNutt v. Superior Court, 133 Ariz. 7, 648 P.2d 122 (1982)

Following the McNutt decision, State v. Holland, 147 Ariz. 453, 711 P.2d 592 (Ariz. 1985) re-emphasized the importance of a defendant's right to counsel. The Arizona Supreme Court again held that the state may not, without justification, prevent access between a defendant and his lawyer when such access would not unduly delay a DUI investigation and arrest.

Because we value the right to counsel so highly...when the right to counsel is violated, then the conviction obtained as a direct result must be set aside...It is quite possible that he would have been instructed to obtain, in some manner, exculpatory evidence. Further, denial of his right to counsel affected the ability of defendant to prepare his defense...Therefore, we agree with the trial court and the majority of the court of appeals that suppression of the breath test alone is an inadequate remedy and dismissal of both charges is required. Holland, supra.

Finally, in State v. Keyonnie, 181 Ariz. 485, 892 P.2d 205 (Ariz.App. Div. 1 1995), the court put the finishing touches on this issue when it held,

"[i]t is only when the exercise of that right will hinder an ongoing investigation that the right to an attorney must give way in time and place to the investigation by police." quoting Kunzler v. Pima County Superior Court, 154 Ariz. 568, 569, 744 P.2d 669, 670 (1987).

The state accurately articulates the law when it posits that only when police conduct interferes with both the defendant's right to counsel and his ability to obtain exculpatory evidence is "tdZismissal of the case with prejudice...the appropriate remedy because the state's action foreclosed a fair trial by preventing [the defendant] from collecting exculpatory evidence no longer available. Keyonnie, sunra."

The Court of Appeals again supported a defendant's right to counsel before a blood test in State v. Leew 184 Ariz. 230, 908 P.2d 44 (Ariz.App. Div.l 1995) when it stated:

> Further, we agree that if there is no interruption of a continuing investigation, defendants may exercise their right to counsel prior to taking a chemical breath test. Juarez, 161 Ariz. at 81, 775 P.2d at 1145 ("[i]nforming the driver that he may not call his attorney before taking the test" violates the driver's right to counsel under the Sixth Amendment). Lastly, we agree that a defendant's request to speak with an attorney must generally be granted. See id. at 79, 775 P.2d at 1143. at p. 234.

CONCLUSION:

Based upon the facts of this case and the case law to be applied to those facts, it is clear in this case that dismissal with prejudice is the appropriate remedy. Defendant requested that he have the assistance of counsel prior to the blood test, and this request was wrongfully denied by Deputy Greene. Whether Defendant said he wanted an attorney present or to contact an attorney, it should have been clear to the officer that he was not going to be able to do either one without being able to make a telephone call. It should also have been clear that Defendant was exercising his right to an attorney when he wanted to call a specific attorney, Harold Hyams. It is not the officers place to use his discretion in determining which attorney is worthy of a phone call due to their primary area of practice.

The officer had 1 1/4 to 1 1/2 hours to obtain a blood test and there was plenty of time to allow Defendant to make a telephone call to an attorney. Deputy Greene testified that there was no unreasonable delay in his investigation. Dep. Greene had driven right by a hospital and several telephones on the way to the jail, yet did not stop to allow Defendant to make a telephone call. Once they arrived at the jail, Dep. Greene made no effort to let Defendant use a telephone to call an attorney. He stayed at the jail another hour to do paperwork and

kept Defendant in a cell. Dep. Greene had adequate time to make arrangements for a phone call, yet told Defendant to arrange that through Pretrial Services, after Dep. Greene left the jail. Defendant was booked and not free to get an independent blood test.

There is no requirement that a defendant make more than one request for an attorney, nor is their a requirement that the magic words "I want to make a telephone call to my attorney be used" before the right to counsel prior to taking a blood test kicks in. Deputy Greene wrongfully determined that Defendant did not have certain rights and arbitrarily decided it was a refusal and did not allow any opportunity to place a simple five minute phone call. Defendant was deprived of his right to a fair trial by not allowing him an opportunity to take a test or obtain an independent test.

Defendant's rights have been violated and this case must be dismissed.

AUGUST 29, 1996, HEARING ON PRETRIAL EVIDENTIARY MOTIONS

INDEX

WITNESS FOR THE STATE:

Todd Edward Greene
Direct Examination . . . . . P. 5
Cross Examination . . . . . P. 17
Redirect Examination . . . . . P. 20
Recross Examination . . . . . P. 23

* * * * *

PROCEEDINGS

THE COURT: 52507, Perez.

MR. GATTO: Michael Gatto for the D.U.I. trial team for the State.

MS. WALTERS: Tamara Walters appearing on behalf of Mr. Perez, who is out of custody and not present. I am going to peek out in the hallway to see if he -

THE COURT: Okay. X

(Pause).

MS. WALTERS: I don't see~*him. I'll waive

his presence.

. . . .
THE COURT: All right. What is this -

there are pending motions?

MS. WALTERS: Yes.

MR. GATTO: That's correct, Judge.

Ms. Walters filed a number of motions. With the exception of the Miranda motion, the burden of going forward rests with the defendant. She can handle that without her client present.

THE COURT: All right. We're going to need some testimony, is that correct, or did you want to

submit this on the facts? Are the facts disputed?

MS. WALTERS: I haven't received the

State's response. so I don't know

THE COURT: Nor have I.

MR. GATTO: Judge, I'm covering this for Ms. Click. She did file oppositions. I have two

copies here.

THE COURT: Why don't you give them to Ms. Walters and she can read the opposition?

Let me take care of this other matter.

It shouldn't take very long.

(Another case was heard.)

THE COURT: Be seated.

Did you guys work it out?

MS. WALTERS: We narrowed it down.

~~'~They'~~won""t~~'~g~ive'~~'the'guy~~a~~ffii~s~'d'emeano"r~' 's~.U'.~I"., 'so'~'~~"~~""

THE COURT: Well, maybe he's not entitled

to one.

Okay. So where are we at in terms of

motions?
We have the motion to dismiss, no

independent blood test, that's one; we have motion to

dismiss, probable cause; motion to dismiss, Rule 8;

motion to suppress statements; denied counsel; Motion in Limine, refusal. Right?

MS. WALTERS: And there was another just

general Motion in Limine for suppression of certain

statements regarding license and the arrest.

THE COURT: Are the facts in dispute?

Do we actually need the officer's testimony?

MS. WALTERS: Well, we probably do need the

testimony.

THE COURT: Okay. Call your witness.

MS. WALTERS: Briefly. We've agreed to

narrow it down, but I think you probably should hear

.

hlm .

THE COURT: Okay. Who is going to call the

officer?

MS. WALTERS: Both of us are calling him.

THE COURT: We'll call him a State's

. . ..

witness.

I'm sorry. Officer, what's your name?

THE WITNESS: Todd Edward Greene.

MR. GATTO: Judge, it's the State's

position pursuant to Rule 16.7 the Arizona Rules of Criminal Procedure and also State vs. Embry (phonetic) that the defendant has the burden of coming forward with a prima facie case when the State's preponderance arises.

THE COURT: Ms. Walters, it's your burden.

TODD EDWARD GREENE, called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. WALTERS:

What is your name, please?

Todd Edward Greene.

Q And where are you employed?

A Pima County Sheriff's Department, traffic

unit.

Q How were you employed on September 21,

1993?

With the Pima County Sheriff's Department

as a Rincon patrol deputy.

Q And approximately 0058 hours, where were you on patrol?

A In the area of Craycroft and River Road, which is in Pima County.

Q What were you doing at that location?

A Monitoring traffic moving through the intersection of Craycroft and River Road.

Q Did you come in contact with a Fermin Perez on that date and approximate time?

A Yes, I did.

Q And how did you happen to come in contact

with him?

A I was stationary at that intersection, like

I said, watching traffic go through that intersection.

I heard a vehicle approaching from the south traveling

northbound on Craycroft approaching River. I then saw

a white sedan approaching River Road, I looked at the

intersection stop lights and noted that all directions

were red, east, west, north, south. However, there was

a green left turn arrow for eastbound -- I'm sorry - westbound River Road for traffic to turn south onto Craycroft. The white sedan proceeded through the intersection without stopping for the red light at what appeared to be a high rate of speed.

I then pulled behind the vehicle, started to accelerate up Craycroft Road. I looked at my speedometer. The speedometer indicated 60 miles-per-hour, then 70, continued all the way up to 90 miles-per-hour and eventually reaching 100 miles-per-hour. I was not at that point losing ground nor gaining ground on the white sedan, I was achieving a common distance and we were approaching Sunrise Drive.

The vehicle Placed its brake liqhts on at Sunrise Drive, the light was green. I had radioed for assistance from a Deputy Nichol to intercept the vehicle as it turned right onto Sunrise Drive. Deputy Nichol was in the area of Kolb and Sunrise, I believe.

At that point, I looked to the right as I approached Sunrise Drive and saw the white sedan with the brake lights on had pulled off of the roadway just to the east of Craycroft. I pulled in behind the vehicle and a male exited the vehicle with his hands over his head and in a surrender position who was later identified as Mr. Perez.

Q Okay. Let me stop you at this point.

When you were following the vehicle, were

you using any kind of radar or any kind of device to determine the speed of the vehicle?

A Just my speedometer.

Q And had your speedometer been calibrated

by anyone with the sheriff's department?

A Other than myself using radar, no.

Q During your following of the vehicle in front of you, what was the distance? About a mile and-a-half?

A Approximately from River to Sunrise is

about a mile and-a-half. I believe.

Q And during that entire time, did you have

constant eye contact with the vehicle in front of you?

A Yes, I did, and no vehicles pulled onto

Craycroft in between us.

Q Isn't it -- would you please describe the terrain in that area from

Sunrise down to River and

Craycroft?

Certainly.

Craycroft Road from River Road to Sunrise

Road Drive is a two lane road. It is hilly. There are points where the road does become rough. That's really all that's notable about the roadway itself.

Q And in this hilly area, didn't you lose contact -- eye contact with the vehicle in front of you

during some of the hilly areas?

A I was about seven car lengths behind the

vehicle, and to my recollection, at no point did I lose

sight of the vehicle's taillights.

Q Did you have a license plate when you first observed the car at the intersection of Craycroft and

River?

A No, not at that time.

Q When did you obtain the license plate?

As I pulled in behind the vehicle when it

pulled off the right-hand side of the roadway on Sunrise Drive.

Q When the vehicle stopped, did you have

contact with the driver of the vehicle?

A Yes, I did.

Q And who was the driver of that vehicle identified as?

A Fermin Perez.

Q Did you advise Mr. Perez why he had been

stopped?

A Yes, I did.

Q And was that because of his speed?

A And running a red light at River and

Craycroft.

Q Did Mr. Perez make any statements to you at

the time of the stop that he wanted an attorney to be

present or request the assistance of an attorney?

A No, not at that time.

Q What did you -- after you had contact with him, did you ask him to perform any field sobriety tests?

A After I had determined that a field sobriety test was necessary, yes.

Q Did you advise him that the field sobriety tests were voluntary?

A Yes.

Q And did you advise him of his Miranda rights prior to him performing the field sobriety tests?

A No, I did not.

MR. GATTO: Objection, irrelevant.

THE COURT: Sustained.

Q (By Ms. Walters) Did he request an attorney prior -- when you asked him to do the field sobriety tests?

A No, he did not.

Q Did he perform field sobriety tests?

A Yes, he did.

Q During the performance of those tests, did he request an attorney or someone to be present?

A Not during the tests, no.

Q Did you perform the horizontal gaze nystagmus?

A No, I did not.

Q What was your reason for not doing that?

A At that time, I was not certified by the State of Arizona to perform that test.

Q After the field sobriety tests, did you place Mr. Perez under arrest?

A Yes, I did.

Q And what time was the stop of Mr. Perez?

A I believe it was about 0105 after the pursuit.

Q And do you recall what time you placed him under arrest?

A Not without referring to my report.

Q Do you have your report with you?

A It is on the State's table, yes.

MS. WALTERS: May I approach, your Honor?

THE COURT: Sure.

Q (By Ms. Walters) This is your report that you brought with you?

A Yes, it is.

Q Okay. If you need to refer to that to refresh your memory?

A It appears that the subject was placed under arrest at 0125 hours.

Q So that was about twenty minutes after the stop?

Yes it was.

Q And at that time, did you read him his Miranda warnings?

A At 0130 hours.

Q Did he understand his Miranda warnings?

A He said, "No."

Q Did he waive his Miranda warnings?

A No, he did not.

Q Did you ask him any further questions

after that?

A No, I did not.

Q Did he at any time after or during the

reading of the Miranda warnings request an attorney?

A Yes, he did.

Q At what point did he request an attorney?

A After I advised him of his Miranda rights, he said -- quote -- "I want an attorney right now, Harold Hyams" -- unquote -- and then he again said

quotes -- "I want an attorney before I do any tests right now" -unquote.

Q And then what did you do after he gave you that information?

A I asked him if he would submit to a

chemical test of his bodily substance as required by

law.

Q When you advised him of that, did you use the implied consent affidavit admin per se?

A Not initially, no.

Q That was what you just advised him in your own words as to what that meant?

A I used the wording, to the best of my recollection, off the admin per se letter.

Q And when did you advise him of -- or request him to submit to a chemical test?

A After I placed him under arrest at the scene.

Q So that was approximately 1:30?

A About that, yes, ma'am.

Q And what was his response?

A Blood.

Q And did you take him to the blood test?

A I put him in the vehicle and began to transport him to the hospital. Mr. Perez then said - quotes -- "I want an attorney present while I do the

test" -- unquote.

Q And which hospital were you going to?

A I believe I was going to El Dorado.

Q And how far were you from the El Dorado Hospital?

A About fifteen minutes.

Q And was this approximately 1:30 in the morning, still?

A About that time.

Q And what did you do after Mr. Perez made that statement that he wanted an attorney?

A I told him that he was not permitted to have an attorney present during the testing and he could make a call to an attorney, but an attorney was not -- it was not his right to have an attorney present. He insisted that he have an attorney present at the test.

Q And was this during your drive to the hospital?

A Just as I left the scene traveling

southbound on Craycroft.

Q And did you go to the hospital?

A No, I did not.

Q And why did you not go to the hospital?

A Because of the wording of Mr. Perez's refusal. I took that as a refusal to admin per se.

Q Prior to you deciding that this was a refusal, what opportunities did you give Mr. Perez to contact an attorney?

A I had no opportunity at the scene to let

him contact an attorney.

Q Were you driving by places where there were public phones or phones available?

A There is an ABCO at Craycroft and River.

Q Did you stop there to let him make a phone

call?

A No. I did not.

Q Were there telephones at the hospital that you were taking him

to?

A Yes, there were.

Q Did you consider taking him to the hospital and giving him an opportunity to call his attorney prior to the blood test?

A No, because of the wording of his refusal.

Q Okay. And so at what point did you read him or go over the implied consent affidavit, admin

per se implied consent affidavit?

A At the Pima County Jail in the Pretrial Services area.

Q Do you recall what time that would have been?

A No, I don't. I don't think it's written anywhere in my report.

It takes about fifteen minutes to get to the jail from that scene, so about 0145.

Q When you read him that affidavit, did he make any statements requesting an attorney?

A I have to make reference to this sheet. He did make a statement, but I don't know what it is.

He said -- quote -- "I want an attorney present right now," and then I noted, it said,

"Would not do test without one."

EXAMINATION

BY THE COURT:

Q Was he given an opportunity to call an attorney at the jail?

A He was booked into jail at that point.

Q So that's, "No."

A Jail personnel do allow them one phone call.

Q Did you make arrangements for him to call an attorney at the jail?

A No, I did not.

Q So he was booked in jail and not free to leave; is that correct?

A He was not free to leave when he was

placed under arrest.

Q Do you know if he spent time at the jail?

A I believe the procedure is he spent

approximately twelve to fourteen hours at the jail until his pretrial

or initial appearance

at 2:00 p.m. the next day.

Q Did you at any time advise him of his

right to an independent blood test?

A No, I didn't.

Q And why did you not do that?

A It has been my training and experience

that when a person refuses a chemical test, that the chemical blood

test admonishment not be given.

MS. WALTERS: I have nothing further.

THE COURT: Mr. Gatto?

MR. GATTO: Thank you, Judge.

CROSS EXAMINATION

BY MR. GATTO:

Q Deputy Greene, you mentioned during your testimony on direct

examination that Mr. Perez's

wording was a refusal. Do you recall what that

wording was?

A Yes.

Q What did he say?

A He said, "I want an attorney before I do

any tests present."

Q In regards to the admin per se form, when

was that read to the defendant?

A When he was at the Pretrial Services.

Q Did you read it verbatim?

A Yes, I did.

Q Did the defendant indicate he understood the information you

provided to him?

A Yes, he did.

Q In regard to the defendant's request to speak to an attorney,

when was that first made?

A After I had placed him under arrest.

Q That was about 1:30 at the scene?

A Yes, sir.

Q When you left the scene, you were on your way to El Dorado Hospital; is that correct?

A Yes, sir.

Q En route, did the defendant say he wanted to do a blood test?

A Yes, sir.

Q Also, he tells you he will not do the test unless he has an attorney present; correct?

A Yes, sir.

Q He also said there should be an independent third party evaluator-present?

A He told me he should have had an evaluator present after the field sobriety tests were completed and he was placed under arrest.

Q After the defendant told you that he wanted an attorney present for the test, what did you do?

A I advised him that he wasn't -- it's not his right to have an attorney present at the test, but he could call an attorney and talk to one, and he adamantly wanted an attorney

present during the test.

Q After that conversation, what did you do?

A I began to transport him to the Pima County Jail.

Q At any time post-arrest, did you offer the defendant an opportunity to make a phone call to an attorney?

A Not while I was at Pretrial Services. I honestly don't recall.

Q The arrest in this case took place at 1:25?

A Yes, it did.

Q The rights were read to him at 1:30?

A Yes, they were.

Q Between 1:25 and 1:30, did you ask the defendant any questions?

A Simply what he wanted done with the vehicle.

MR. GATTO: I don't have any further questions.

MS. WALTERS: I just have a few,

your Honor.

THE COURT: Okay.
REDIRECT EXAMINATION

BY MS. WALTERS:

Q When he asked -- okay. When he asked to

have an attorney present and you were on the way to the

hospital, would it have delayed your investigation if you would have allowed him to make a phone call to an

attorney?

A I can't testify to that. I have no idea.

I don't know how long the phone call would have taken, if he

would have had an attorney that he wanted to talk

to. He said Harold Hyams, a personal injury attorney.

I honestly don't know.

Q But you had time, didn't you, to take him to a phone and let him

make a phone call. I mean, the time wasn't running out where it was

no longer time for

taking the blood sample?

A Are you trying to find out if I was pressed for time to get a chemical test of his bodily substance?

Well, yeah, that was part of my question.

I didn't see that as a problem, no.

So the time frame wasn't a problem to get the test?

A No.

Q But how about allowing him to make a phone call to try to contact an attorney? Did you have stufficient time for that?

A Again, I don't know. I don't know if that would have delayed it to the point where I would have had to be past that two hour time limit. I have no idea.

Q But it would have taken him five to ten minutes to make a few phone calls?

A He could have stopped and made that determination at that point.

Q You didn't allow him that opportunity; is that correct?

A He wanted an attorney present. I offered him the attorney, to call

an attorney, or the

opportunity to call an attorney. He wanted an attorney

present.

THE COURT: You did ask him if he wanted to

make a phone call?

THE WITNESS: Yes, I did.

THE COURT: And at what point did you do

that?

THE WITNESS: In the vehicle after he told

me that he wanted an attorney present during the chemical testing.

Q (By Ms. Walters) So it's now your
testimony that you told him that he could make a phone call?

A I advised him that he was not allowed to have an attorney
present

during the chemical testing. I then told him he could make a phone

call to talk to an attorney, but he did not have the right to have an

attorney present.

Q Okay. But that's a change in your testimony. So now you're

saying that you told him he could make a phone call?

A I answered that before.

Q And is that in your police report?

A No.

Q It was -- did you mention that when we had our interview on August 21, 1996?

A I don't think so.

Q But now all of a sudden, you remember that you gave him or told him he could make a phone call?

A Yes.

Q And did he say, "I'll make a phone call"?

Did you give him any opportunity, take him to a phone?

A No. He said, "I want an attorney present."

Q Did he specifically say, "I don't want to make a phone call"?

A No, he didn't.

Q And assuming his attorney could have been there at the hospital and that he was at the hospital in a reasonable period of time and not to delay the proceedings, it would have been possible to have his attorney present; isn't that correct?

A I had been trained that it was not his

right to have an attorney present at the point of the

chemical test.

Q But he could have had an attorney present when the blood was drawn; is that right?

MR. GATTO: Objection. It's irrelevant.

THE COURT: Sustained.

MS. WALTERS: I have nothing further.

THE COURT: Mr. Gatto, anything further? MR. GATTO: Just briefly, Judge.

RECROSS EXAMINATION

BY MR. GATTO:

Q Deputy Greene, after you told the defendant

after he was stopped he could make a phone call, what

was the dialogue from there?

A He told me that he wanted an attorney

present at the point of the chemical test and I told

him that he doesn't have a right to have an attorney

present, and that was the end of the conversation.

MR. GATTO: I have nothing further.

THE COURT: Thank you, Officer. You can step down.

Any other testimony?

MS. WALTERS: No.

THE COURT: Argument?

MS. WALTERS: Yes, your Honor.

I believe that the charges should be dismissed because of the officer's violation of his right to contact an attorney prior to any blood test being drawn.

I think ths! tStato n; tod a nas:o Klintal sar vs. Superior Court of Pima County (phonetic), in their response, stating that the request to speak to an attorney prior to being administered a test, that he should be afforded an opportunity to do so when such consultation would not interfere with the investigation or the taking of the test.

There is no testimony that Mr. Perez's request for an attorney would have delayed or caused any problems with the State going ahead with the blood test. He did voluntarily agree to take the blood test. He wanted to consult with

an attorney prior to the actual blood draw. There is no evidence that

that would have caused any delay on the part of the State to go ahead and get the blood test at the hospital.

There were numerous opportunities for the officer to provide Mr. Perez with the opportunity to call an attorney. There were places nearby, there were public phones, he could have gone to the hospital and allowed him to make a call there. There was sufficient time to make several phone calls, maybe wait a short time for an attorney to call back or even appear at the hospital. Mr. Perez's requests could have easily

been complied with.

The State could have taken the blood test, which could ultimately have assisted Mr. Perez in his defense also. However, he was denied this by the officer summarily deciding that that was a refusal,

without giving him an opportunity to take any steps to obtain an attorney.

And the recent testimony by Deputy Greene that all of a sudden,

you know, after he's given

testimony and written reports and given statements to

me during a lengthy interview, thatts the first time

I've ever heard that he said he could make a phone

call. I find that unbelievable, your Honor, and

I mean the testimony prior to that, when I was asking

him questions, was very clear that he did not offer Mr. Perez a

phone call at all, that he took it as a refusal just because he said he

wanted an attorney

present.

That matter could have been clarified if he would have given Mr.

Perez an opportunity just to make a phone call and perhaps

consulting with an attorney would have appeased him and he would have gone ahead with a blood test or his attorney could have had

sufficient time to meet him at the hospital. We don't know that, but

there is sufficient time and sufficient

opportunity.

At that point, if there was a delay or he couldn't get in touch with

his attorney or continue to refuse, then perhaps it could have been

deemed as a valid refusal. but the officer just jumped the gun and reached the opinion that it was a refusal without providing him

THE COURT: When did you interview the officer?

MS. WALTERS: On August 21.

THE COURT: Did you specifically ask him any question about whether he offered the defendant a phone call?

MS. WALTERS: Well, I could go through this, your Honor.

MR. GATTO: Judge, I would have no objection to allowing the Court to have Ms. Walters submit a copy of the interview for your consideration in this matter.

THE COURT: Well, I don't want to read through the whole interview. If there is a specific answer to that specific question, it might be helpful. I mean, if she didn't ask it at all, then the officer certainly doesn't have to volunteer it.

MS. WALTERS: I have the places marked that I can look through, but it might take me a moment. You might want to take -- I'll look at it when Mr. Gatto is doing his argument and see if I asked the

particular question.

THE COURT: Okay. Mr. Gatto?

MR. GATTO: Judge, two questions.

No. 1 is the credibility of Deputy Greene's testimony in regards to the phone call. There is no mention in the police report, also in the interview of

Ms. Walters.

Beyond that, the question then becomes the wording of the defendant's refusal, "I will not do

the blood test unless I have an attorney present."

He's not entitled to have an attorney present, he's entitled to consult with an attorney to receive information. However, he cannot unreasonably interfere or delay the State's investigation.

Here the defendant's insistence that he have an attorney present is unreasonable and that's supported by law. Deputy Greene said, "You can make a phone call if you want to do it," and the defendant said, "I want to have an attorney present." He is not

entitled to that. So the wording in evidence is

crucial to the determination of whether or not the

Court should feel to dispose of the matters on that

ssue .

In regards to the independent test filed

by Ms. Walters, State vs. North, it said that when we

read suspects the admin per se

THE COURT: That's dependent upon the

refusal.

MR. GATTO: Correct, but there is no

requirement of informing individuals of the right-to an independent

test wherein admin per se is read to them.

I'll leave it to the Court's discretion. The evidence is in as far as the deputy testified that he gave the defendant an opportunity to make

a phone call in that he explained to him, "We will let you make

a phone call." The defendant's insistence of having an

attorney present for it, which he is not entitled to, constituted a

refusal and a waiver of his right to

contact an attorney.

MS. WALTERS: Well, your Honor, I still am reviewing it, but on page 40, when I'm asking him, I asked him, "And what opportunity did you provide him to contact this attorney," and he replied, "Well,

at that point, I took him to jail because he said earlier while we were in the vehicle, he said, 'I want an

attorney before I take any tests of my blood.'" So I asked him specifically, "What opportunity did you provide him to contact an attorney," and he didn't make any statement that he said he gave him an

opportunity to make a phone call.

THE COURT: Did you ask the officer at all

about a telephone call anywhere in the

MS. WALTERS: Well, I know I asked him if

he was given an opportunity to make calls, and, you

know, besides that, he said that he didn't reallycompletely read him the admin per se affidavit until

after he deemed it to be a refusal when he got to the

jail, so I don't know how that can be deemed to be a valid waiver if

he wasn't even fully advised of the

implications on that.

THE COURT: Well, presumably, at Pretrial

Services, he could have said, "Okay, I'll take a blood test."

Actually, isn't it the officer's discretion which test to give him?

MS. WALTERS: Excuse me?

THE COURT: Isn't it at the officers's

discretion which test is given, so at Pretrial Services he could have

said, "Okay, I'll take a test," they could have given him the breath

test.

MS. WALTERS: Well, I think he gave him

the opportunity.

But let's see. This is after he read him the -- formally went through

the admin per se, and then I asked him what opportunity -- okay.
They were at the

jail

MR. GATTO: Page, please?

MS. WALTERS: 44. Excuse me.

-- at the jail, and I asked him, "Did you go -- A, formally go

through the admin per se and implied consent affidavit?" "No."

"And then what opportunity did you give him to contact his attorney when he was at Pretrial Services?" "I told him, 'You're more than welcome to use the phone here if the Pretrial Services people will let you make a phone call.'" And that's the first time that he's ever mentioned giving him an opportunity to make a phone

call.

"And did you specifically provide him with a phone, he -- you just left that up to Pretrial Services?" "That's correct."

His request to make a phone call.

"Did you provide him with a phone book or anything

like that ? " "No ~~~

And then I went through the same questions I asked today, "Would you offer him an opportunity to call the different places," and he said, "No," and never once until now did he state that he told him

he could make a phone call.

MR. GATTO: Judge, may I offer another portion of Ms. Walters' interview transcript?

I understand the Court's reluctance in not wanting to read the entire

transcript, but also on page 41, this is continuing from the first statement Ms. Walters was making with regards to the defendant's request for

an attorney, it continues on, and on line 6, page 41 of

the interview, it's an answer now, it says -- it says

MS. WALTERS: What page?

MR. GATTO: 41.

MR. GATTO: "-- comma, and after that -

and that was after previously agreeing to take a blood test, so I explained to Mr. Perez that his license would be automatically suspended for twelve months if he refused to test at this point and he said he wasn't

going to take a test without an attorney present."

And, Judge, I submit that for your consideration of Deputy Greene's credibility on the stand in that his testimony today does

not differ significantly from the interview transcript of

Ms. Walters.

Additionally, the information she provided from reading from page 44 wherein they are at Pretrial Services, he says there is a phone

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MS. WALTERS: What page?

MR. GATTO: 41.

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Ms. Walters.

Additionally, the information she provided from reading from page 44 wherein they are at Pretrial Services, he says there is a phone

now, there is no

violation there.

THE COURT: All right. The motion to dismiss regarding

independent blood test is denied.

Motion to dismiss regarding probable cause denied.

Motion to dismiss per Rule 8 denied.

Ms. Click's recitation of the excluded

time in Justice Court seems to be appropriate.

Motion to suppress statements or motion

to dismiss regarding denial of counsel denied.

You want me to go through the Motion in

Limine that you filed?

Is this set for change of plea next week?

MS. WALTERS: Well, it's set on the 4th for change of plea and a trial on the 5th, and I've just interviewed the custodian of records

and I just gave Mr. Gatto a letter to take to Ms. Click. The issue on

doing anything different with the plea and perhaps after the motion

hearings, then my client -- I did give him a copy of the officer

interview. I'm not sure if it will be a change of plea, but there is a

possibility.

The Motion in Limine is just very -- we can do that before trial.

THE COURT: All right. The Motion in

Limine will be at the time of trial, Motion in Limine, refusal of

D.U.I. intoxilyzer.

I think, really, the issue of refusal with

an appropriate jury instruction ought to take care of the refusal

issue.

MS. WALTERS: Okay.

THE COURT: So Motion in Limine regarding

refusal of D.U.I. intoxilyzer is denied. I think what you do is you let

the jury decide whether it was a refusal or not.

Okay. I think that covers all the motions.

And you have a change of plea set for
September 4? MS. WALTERS: Right. THE COURT: Okay.

Thank you. MS. WALTERS: Thank you.

MR. GATTO: Thank you, Judge. (Court was adjourned at 10:40

a.m.)

* * * * *

CERTIFICATE

I, Van G. Honeman, do hereby certify that as an Official Court Reporter for the Pima County Superior Court, I reported the foregoing proceedings to the best of my skill and ability; and that the same was transcribed under my supervision via computer-aided transcription; and that the foregoing pages of typewritten matter are a true, correct and complete transcript of all the proceedings had as set forth in the title page hereto.

VAN G. HONEMAN, RDR
Official Court Reporter
Pima County Superior Court
Tucson, Arizona

AUGUST 16, 1996, MOTION TO SUPPRESS/DISMISS

Defendant, by and through counsel undersigned, requests that this court suppress statements and testimony unlawfully obtained from defendant on the date of arrest, and dismiss the charge because Defendant was denied assistance of counsel, for the reasons set forth in the attached memorandum of points and authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS:
On September 21, 1993 the defendant was stopped by Pima County Sheriff Officers. During the course of the investigation, defendant was asked a number of questions. Miranda rights were not read to the defendant prior to interrogation. Defendant had immediately and continuously requested the assistance of an attorney, and Defendant was denied reasonable access to his attorney, in violation of his rights.

LAW:

The Arizona Constitution Article II, Section 10, states, "No person shall be compelled in any criminal case to give evidence against himself....".

When an individual is deprived of his freedom by authorities in any significant way and is subject to questioning, the privilege against self-incrimination is jeopardized. Miranda v. Arizona, 384 U.S. 436 (1966). "tA]n arrest is complete when the suspect's liberty of movement is interrupted and restricted by the police." State v. Ault, 150 Ariz. 459, 724 P.2d 545 (1986); State v. Winegar, 147 Ariz. 440, 447-48, 711 P.2d 579, 586-87 (1985); Commonwealth v. Bruder, 528 A.2d 1385 (Pa.Super. 1987). "Another significant factor is the display of official authority, such that, 'a reasonable person would have believed he was not free to leave.'" State v. Ault, supra; State v. Winegar, supra, quoting Florida v. Royer, 460 U.S. 491, 501, 103 S.Ct. 1319, 1326, 75 L.Ed.2d 229 (1983).

In the case at hand, officers arrived at the scene and began a DUI investigation. The officers questioned defendant as to whether defendant had been drinking. At this point defendant was no longer free

to leave. Defendant was deprived of his/her freedom by the authorities and was subject to questioning. Defendant invoked his right to an attorney immediately upon contact by the officers, and several times thereafter. Because this is a violation of the defendant's rights, that evidence given by the defendant must be suppressed, and the charge dismissed.

While the Miranda requirements are not generally applicable to routine traffic offenses where the driver is detained no lonqer than necessary to make out the citation and have it signed, the warnings must be given (1) prior to any questioning regarding the state of intoxication of the driver; (2) when an arrest is to be made. Campbell v. SuDerior Court, 106 Ariz. 542, 479 P.2d 685 (1971). In Campbell, "the reporter's transcript reflects the appropriate Miranda warnings

were given...prior to ans questioning regarding the state of intoxication of the defendant." 106 Ariz. at 552.

The questioning and subsequent testing, then focused on the accused and the nature and subject matter of the questions pertained to the criminal offense. In the absence of Miranda warnings, the statements obtained under these circumstances must be suppressed.

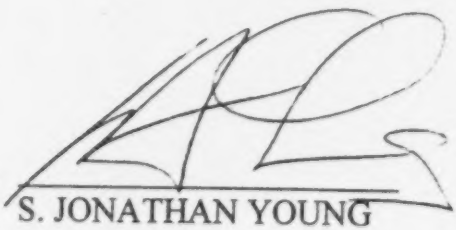
Interrogation includes not only direct questions, but also police statements reasonably likely to elicit incriminating responses. Rhode Island v. Innis, 446 U.S. 291 (1979). Defendant's statements made during the Field Sobriety Tests must be suppressed. Defendant was reacting to the conduct of the officers, conduct the officers knew was reasonably likely to elicit incriminating responses. At no time prior to the extensive initial questioning of defendant did the officers give defendant Miranda warnings informing him/her that anything he/she did or

said could and would be held against him/her. In the case at bar, defendant's privilege against self-incrimination has been violated.

The issue then in determining whether Miranda warnings must be given is not whether probable cause existed or a formal arrest made, but whether the officer's requests under the circumstances amounted to custodial interrogation. State v. Dickey, 125 Ariz. 163, 608 P.2d 302 (1980).

RESPECTFULLY SUBMITTED this 16th day of August, 1996.

TAMARA R. WALTERS
Attorney for Defendant



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